

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

IN RE:

APPLICATION OF THE COMMITTEE ON  
THE JUDICIARY, U.S. HOUSE OF  
REPRESENTATIVES, FOR AN ORDER  
AUTHORIZING THE RELEASE OF  
CERTAIN GRAND JURY MATERIALS

Misc. No. 19-\_\_\_\_\_

**Oral Argument Requested**

**APPLICATION OF THE COMMITTEE ON THE JUDICIARY,  
U.S. HOUSE OF REPRESENTATIVES, FOR AN ORDER AUTHORIZING  
THE RELEASE OF CERTAIN GRAND JURY MATERIALS**

Pursuant to Local Rule 57.6, the United States House of Representatives, Committee on the Judiciary (the Committee), through undersigned counsel, respectfully requests that this Court issue an order pursuant to Federal Rule of Criminal Procedure 6(e) authorizing the release to the Committee of: (1) all portions of Special Counsel Robert S. Mueller III's *Report on the Investigation Into Russian Interference In The 2016 Presidential Election* (the Mueller Report) that were redacted pursuant to Federal Rule of Criminal Procedure 6(e); (2) any underlying transcripts or exhibits referenced in the portions of the Mueller Report that were redacted pursuant to Rule 6(e); and (3) transcripts of any underlying grand jury testimony and any grand jury exhibits that relate directly to (A) President Trump's knowledge of efforts by Russia to interfere in the 2016 U.S. Presidential election; (B) President Trump's knowledge of any direct or indirect links or contacts between individuals associated with his Presidential campaign and Russia, including with respect to Russia's election interference efforts; (C) President Trump's knowledge of any potential criminal acts by him or any members of his administration, his campaign, his personal associates, or anyone associated with his administration or campaign; or (D) actions taken by former White

House Counsel Donald F. McGahn II during the campaign, the transition, or McGahn's period of service as White House Counsel.

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## **PRELIMINARY STATEMENT AND INTEREST OF THE APPLICANT**

Special Counsel Robert S. Mueller III's *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* (the Mueller Report) provided Members of Congress with substantial evidence that the President of the United States repeatedly attempted to undermine and derail a criminal investigation of the utmost importance to the nation. That investigation sought to uncover Russia's actions to interfere with the integrity of an American presidential election. Russia engaged in these acts in order to benefit then-candidate Donald J. Trump. President Trump repeatedly denied Russia's actions and fired the director of the Federal Bureau of Investigation (FBI), resulting in the appointment of Mr. Mueller as Special Counsel. The Mueller Report describes detailed evidence that President Trump then sought to terminate Special Counsel Mueller and to interfere with his investigation.

Because Department of Justice policies will not allow prosecution of a sitting President, the United States House of Representatives is the only institution of the Federal Government that can now hold President Trump accountable for these actions. To do so, the House must have access to all the relevant facts and consider whether to exercise its full Article I powers, including a constitutional power of the utmost gravity—approval of articles of impeachment.

That duty falls in the first instance to the House Committee on the Judiciary (the Judiciary Committee or the Committee). As Chairman Nadler recently wrote in a Memorandum issued to all Members of the Committee, “[w]ith regard to the Committee’s responsibility to determine whether to recommend articles of impeachment against the President, articles of impeachment have already been introduced in this Congress and referred to the Judiciary Committee. They are under consideration as part of the Committee’s investigation, although no final determination has been made. In addition, the Committee has the authority to recommend its own articles of

impeachment for consideration by the full House of Representatives.” Jerrold Nadler, Chairman, H. Comm. on the Judiciary, *Memorandum Re: Hearing on “Lessons from the Mueller Report, Part III: ‘Constitutional Processes for Addressing Presidential Misconduct,’ ”* at 3 (July 11, 2019) (July 11 Memorandum) (attached as Ex. A to Declaration of Perry H. Apfelbaum). As Chairman Nadler further explained, “[t]he Committee seeks key documentary evidence and intends to conduct hearings with [former White House Counsel Don] McGahn and other critical witnesses testifying to determine whether the Committee should recommend articles of impeachment against the President or any other Article I remedies, and if so, in what form.” *Id.*

To meaningfully consider whether to exercise this authority—as well as to exercise its other pressing legislative and oversight responsibilities—the Committee must obtain evidence and testimony in a timely manner. In particular, the Committee has sought access to the full contents of the Mueller Report, and it now seeks this Court’s permission to access those portions that the Department of Justice has redacted pursuant to Federal Rule of Criminal Procedure 6(e).

The Committee’s request is consistent with numerous prior instances in which it has sought and obtained grand jury materials when evaluating allegations of misconduct by government officials, including allegations against a sitting President. The full Mueller Report provides an essential roadmap for the Committee’s efforts to uncover all facts relevant to Russia’s attack on the 2016 Presidential election and to any attempts by the President to prevent Congress from learning the truth about those attacks along with their aftermath.

Furthermore, the Committee requires access to all underlying grand jury materials that bear directly on President Trump’s knowledge of any potential misconduct during the 2016 election campaign and afterward—and, thus, bear directly on the President’s state of mind at the time of relevant events. These materials are essential to the Committee’s ongoing investigation, including



its ability to effectively question one of its most critical witnesses, Mr. McGahn.

This Court is authorized to disclose these materials pursuant to Rule 6(e)(3)(E) because the Committee seeks to use them “preliminarily to or in connection with a judicial proceeding.” The D.C. Circuit has construed that provision to apply where, as here, this Committee is conducting an investigation to determine whether to recommend articles of impeachment. The Committee has a compelling need for the requested materials: the Committee must be permitted to assess the full facts as described in the Mueller Report, particularly those redacted passages that relate to interactions between Trump Campaign officials and agents of the Russian government. The Committee must also be permitted to review any grand jury materials that bear directly on the President’s knowledge of potential misconduct and on actions taken by McGahn. The Committee has targeted its request to include only those grand jury materials that are referenced or included in—but redacted from—the Mueller Report itself, and any underlying grand jury materials that would directly shed light on the President’s state of mind at the time of relevant events or that relate to actions taken by the Committee’s key witness. The Committee’s interest in obtaining a limited disclosure of these materials far outweighs any interests in secrecy.

## **BACKGROUND**

### **A. Findings by Special Counsel Mueller**

#### **1. Russia’s Attack on the 2016 U.S. Presidential Election**

The Special Counsel’s Report concludes that the “Russian government interfered in the 2016 presidential election in sweeping and systematic fashion.” Mueller Report, Vol. I at 1. That interference occurred principally through two operations. First, the Russian-funded Internet Research Agency (IRA) used “information warfare” to sow political and social discord intended to benefit then-candidate Trump’s campaign (the Trump Campaign) and to harm former Secretary

of State Hillary Rodham Clinton’s campaign (the Clinton Campaign). *Id.* Vol. I at 4, 25. The IRA created fake social media accounts across various platforms, impersonating American voters and organizations and illegally purchasing political advertisements. *Id.* Vol. I at 15-32. “Collectively, the IRA’s social media accounts reached tens of millions of U.S. persons.” *Id.* Vol. I at 26.

Second, Russia’s Main Intelligence Directorate of the General Staff of the Russian Army, known as the GRU, “conducted computer-intrusion operations against entities, employees, and volunteers working on the Clinton Campaign and then released stolen documents.” *Id.* Vol. I at 1. The entities that the GRU successfully hacked and stole from included the Democratic National Committee, the Democratic Congressional Campaign Committee, and the Clinton Campaign (including campaign chairman John Podesta). *Id.* Vol. I at 38, 49-50. Through these operations, the GRU stole hundreds of thousands of documents, which it then disseminated in a targeted fashion through fictitious online personas and through WikiLeaks. *Id.* Vol. I at 36, 41-48, 58.

Additionally, the GRU targeted “individuals and entities involved in the administration of [] elections. Victims included U.S. state and local entities, such as state boards of elections . . . , secretaries of state, and county governments, as well as individuals who worked for those entities.” *Id.* Vol. I at 50. For example, in the summer of 2016 the GRU successfully breached the Illinois State Board of Elections, “gained access to a database containing information on millions of registered Illinois voters,” and stole “data related to thousands of U.S. voters.” *Id.*

## **2. The Trump Campaign’s Efforts To Benefit from Russia’s Attack**

The Mueller Report provides detailed evidence that the Trump Campaign welcomed Russia’s election interference operations. According to the Report, the Campaign “expected it would benefit electorally from information stolen and released through Russian efforts.” *Id.* Vol. I at 1-2. In particular, the Trump Campaign “showed interest in WikiLeaks’s releases of

documents and welcomed their potential to damage candidate Clinton,” and by the late summer of 2016 it was even “planning a press strategy, a communications campaign, and messaging based on the possible release of Clinton emails by WikiLeaks.” *Id.* Vol. I at 5, 54. Candidate Trump cited WikiLeaks in public statements more than 140 times throughout the campaign and publicly praised its actions, even declaring, “I love WikiLeaks.”<sup>1</sup> In at least one instance, the Mueller Report suggests that he had advance knowledge of upcoming releases by WikiLeaks: the report details a phone call that Trump took on his way to an airport while he was with former deputy campaign manager Rick Gates, and it states that “shortly after the call candidate Trump told Gates that more releases of damaging information would be coming.” *Id.* Vol. I at 54.

Senior Trump Campaign officials also engaged directly with agents of the Russian government in the hopes of receiving damaging information about Secretary Clinton. On June 3, 2016, publicist Robert Goldstone emailed Donald Trump, Jr. to convey that a Russian prosecutor was offering to provide the Trump Campaign ““with some official documents and information that would incriminate Hillary and her dealings with Russia.”” *Id.* Vol. I at 110. Goldstone explained that this was ““part of Russia and its government’s support for Mr. Trump.”” *Id.* Trump Jr. “immediately responded that ‘if it’s what you say I love it,’” and arranged a meeting on June 9, 2016 between himself, campaign chairman Paul Manafort, senior adviser Jared Kushner, and the Russian prosecutor and her associates. *Id.* Vol. I at 110, 117.

More broadly, the Mueller Report details approximately 170 contacts between individuals associated with the Trump Campaign or Presidential transition and individuals associated with the

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<sup>1</sup> John Wagner & Felicia Sonmez, *Trump Disavows Past Enthusiasm for WikiLeaks After Assange’s Arrest*, WASH. POST (Apr. 11, 2019), online at [https://www.washingtonpost.com/politics/trump-disavows-past-enthusiasm-for-wikileaks-after-assanges-arrest/2019/04/11/ec1785e2-5c74-11e9-9625-01d48d50ef75\\_story.html?utm\\_term=.12fead2b24a3](https://www.washingtonpost.com/politics/trump-disavows-past-enthusiasm-for-wikileaks-after-assanges-arrest/2019/04/11/ec1785e2-5c74-11e9-9625-01d48d50ef75_story.html?utm_term=.12fead2b24a3).

Russian government. Senior campaign officials participating in these interactions included Trump Jr., Kushner, Manafort, Gates, and Lieutenant General Michael Flynn. *Id.* Vol. I at 110-23 (Trump Jr. and June 9 Trump Tower meeting), 129-44 (Manafort and Gates), 159-63 (Kushner), 167-74 (Flynn). These contacts also included interactions between the Trump Organization, via the President’s former personal attorney, Michael Cohen, and Russian real estate developers and government officials concerning the potential development of a Trump Tower building in Moscow. *See, e.g., id.* Vol. I at 69-80.

### **3. President Trump’s Efforts To Undermine Special Counsel Mueller’s Investigation**

The Mueller Report describes “multiple acts by the President that were capable of exerting undue influence over law enforcement investigations, including the Russian-interference and obstruction investigations.” *Id.* Vol. II at 157. These acts “ranged from efforts to remove the Special Counsel and to reverse the effect of the Attorney General’s recusal; to the attempted use of official power to limit the scope of the investigation; to direct and indirect contacts with witnesses with the potential to influence their testimony” and to “encourage witnesses not to cooperate with the investigation.” *Id.* Vol. II at 157, 7. In total, the Report analyzed at least ten separate episodes of potentially obstructive conduct by President Trump.

The FBI opened an investigation of “potential coordination between Russia and the Trump Campaign” in late July or early August of 2016. *Id.* Vol. I at 89 n.465. The Mueller Report documents that President Trump began taking actions to undermine that investigation soon after his inauguration. Less than a week after President Trump took his oath of office, McGahn was informed by Acting Attorney General Sally Yates that National Security Advisor Flynn was not being truthful when he claimed never to have discussed the United States’s pending imposition of sanctions with Russia’s ambassador, Sergey Kislyak, in December 2016. *Id.* Vol. II at 31. Yates

disclosed to McGahn that Flynn had been interviewed by the FBI about this matter, and Yates indicated that Flynn may have lied. *Id.* The next day, after McGahn told President Trump about this conversation, the President invited FBI Director James Comey to a private dinner at the White House and repeatedly stated, “I need loyalty.” *Id.* Vol. II at 33-36 (quoting Comey’s statements). After news about Flynn’s lies became public and Flynn was forced to resign, President Trump arranged to speak with Comey alone in the Oval Office and stated, “I hope you can see your way clear to letting this go, to letting Flynn go. . . . I hope you can let this go.” *Id.* Vol. II at 39-40 (quoting Comey’s statements).

On Friday, May 5, 2017, President Trump told several aides that he planned to fire Comey. Over the ensuing weekend, the President had senior adviser Stephen Miller draft a letter explaining his reasons for the termination. *Id.* Vol. II at 64-65. On Monday, May 8, the President met with McGahn, Attorney General Jeff Sessions, and Deputy Attorney General Rod Rosenstein and informed them that he planned to have Comey removed. Sessions and Rosenstein agreed to craft their own separate explanation for Comey’s removal, and White House officials agreed that President Trump’s draft termination letter would “not see the light of day.” *Id.* Vol. II at 66-68 (quoting notes from McGahn’s chief of staff) (brackets omitted).

Director Comey was fired the next day, and the White House gave a series of conflicting explanations for his removal. *Id.* Vol. II at 70-74. The Mueller Report states that President Trump was motivated at least in part by a desire to “protect himself from an investigation into his campaign.” *Id.* Vol. II at 76. Although the Mueller investigation did not establish that the Trump Campaign had actively conspired with Russia in its election interference activities, the Special Counsel concluded that “the evidence does indicate that a thorough FBI investigation would uncover facts about the campaign and the President personally that the President could have

understood to be crimes or that would give rise to personal and political concerns.” *Id.*

On May 17, 2017, soon after Comey’s firing, Rosenstein appointed Mueller as Special Counsel. Special Counsel Mueller was given authority to investigate “the Russian government’s efforts to interfere in the 2016 presidential election, . . . any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump,” and any other matters that might arise “directly from the investigation.”<sup>2</sup> Special Counsel Mueller’s investigation came to include an investigation of “whether the President had obstructed justice in connection with Russia-related investigations” and of “potentially obstructive acts related to the Special Counsel’s investigation itself.” *Id.* Vol. II at 1. When Sessions informed President Trump of Mueller’s appointment, the President “slumped back in his chair and said, ‘Oh my God. This is terrible. This is the end of my Presidency. I’m f\*\*ked.’” *Id.* Vol. II at 78 (quoting notes from Sessions’s chief of staff, Joseph Hunt). With McGahn and Hunt present, President Trump ““became angry and lambasted the Attorney General for his decision to recuse himself from the investigation”” and for failing to ““protect[]”” him. *Id.* (quoting Hunt’s notes and Sessions’s interview statement).

On Saturday, June 17, 2017, shortly after President Trump learned that he was personally under investigation for obstruction of justice, he called McGahn twice and ordered him to ““Call Rod [Rosenstein]”” and tell him that ““Mueller has to go.”” *Id.* Vol. II at 85-86 (quoting McGahn’s statement). The Mueller Report states that “[s]ubstantial evidence indicates that the President’s

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<sup>2</sup> Office of the Deputy Attorney General, Order No. 3915-2017, *Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters* (May 17, 2017). The Special Counsel’s jurisdiction also included “any other matters within the scope of 28 C.F.R. § 600.4(a).” *Id.* Section 600.4(a) states that “[t]he jurisdiction of a Special Counsel shall also include the authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel’s investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.”

attempts to remove the Special Counsel were linked to the Special Counsel's oversight of investigations that involved the President's conduct—and, most immediately, to reports that the President was being investigated for potential obstruction of justice.” *Id.* Vol. II at 89. McGahn prepared to resign rather than carry out the order. *Id.* Vol. II at 86-87.

When the press reported this episode in January 2018, President Trump—first through his private counsel, then through Staff Secretary Rob Porter, and then in person at a meeting in the Oval Office—directed McGahn to deny the reports, including by asking McGahn to create a written record stating the President never asked him to fire Mueller. *Id.* Vol. II at 114-17. Even when McGahn expressed that he “did not want to issue a statement or create a written record denying facts that [he] believed to be true,” the “President nevertheless persisted and asked McGahn to repudiate facts that McGahn had repeatedly said were accurate.” *Id.* Vol. II at 119.

Meanwhile, throughout 2017 and for much of 2018, President Trump sought to have Sessions “unrecuse” himself from the Special Counsel's investigation and interfere in the investigation by curtailing its scope. The President first enlisted McGahn in March 2017 to try to prevent Sessions from recusing himself. *Id.* Vol. II at 49. When that failed, President Trump chastised McGahn and on several occasions personally asked Sessions to reverse his decision. *Id.* Vol. II at 50-51, 107, 109. On two separate occasions during the summer of 2017, President Trump directed his former campaign manager, Corey Lewandowski, to deliver a message to Sessions. First, two days after the President tried to have Mueller fired, President Trump met alone with Lewandowski in the Oval Office. *Id.* Vol. II at 91. According to Lewandowski's notes, “[t]he President directed that Sessions should give a speech publicly announcing” that Sessions was curtailing Special Counsel Mueller's investigation to “election meddling for future elections.” *Id.* President Trump followed up with Lewandowski a month later in another one-on-one Oval

Office meeting. *Id.* Vol. II at 92-93. President Trump again requested that Sessions “unrecuse” himself in December 2017, *id.* Vol. II at 109, and he lamented his decision to appoint Sessions as Attorney General in multiple interviews up through August 2018, *id.* Vol. II at 93-94, 110-11.

The Mueller Report further documents actions taken by President Trump that were “directed at possible witnesses in the Special Counsel’s investigation,” including Flynn, Manafort, and Cohen. *Id.* Vol. II at 120. The President passed messages to Flynn encouraging him to “stay strong,” and, after Flynn’s counsel informed the President’s personal counsel that Flynn had decided to cooperate with the investigation, the President’s counsel left a voicemail with Flynn’s counsel asking for “some kind of heads up” if Flynn planned to reveal “information that implicates the President.” *Id.* Vol. II at 121 (quoting voicemail transcript).

After Manafort and Gates were charged with various criminal offenses, Manafort told Gates that “he had talked to the President’s counsel and they were ‘going to take care of us.’” *Id.* Vol. II at 123 (quoting Gates’s interview statement). President Trump publicly expressed support for Manafort before Manafort decided to cooperate with the government, including by describing the Special Counsel’s investigation as a “rigged witch hunt” while jury deliberations were ongoing. *Id.* Vol. II at 125-26. At the same time, the President’s personal attorney, Rudolph Giuliani, publicly speculated on multiple occasions about the possibility of a pardon for Manafort. *Id.* Vol. II at 124, 127. The Special Counsel’s office found evidence that these actions could have influenced decisions by both Flynn and Manafort about whether to cooperate with the investigation, and that the President specifically “intended to encourage Manafort to not cooperate.” *Id.* Vol. II at 131-32.

The Special Counsel’s office also investigated whether President Trump engaged in witness tampering with respect to Cohen. Cohen admitted to providing false statements to



Congress about the timing of the Trump Tower-Moscow project to make his statements consistent with the President's public narrative. *Id.* Vol. II at 142. In a separate case that was referred to prosecutors in New York, Cohen admitted to orchestrating hush money payments to women alleging affairs with then-candidate Trump in violation of campaign finance laws. *Id.* Vol. II at 144-45. Before Cohen chose to cooperate in either investigation, "the President publicly and privately urged Cohen to stay on message and not 'flip.'" *Id.* Vol. II at 154. He sent private messages to Cohen to "'stay strong,'" *id.* (quoting Cohen's interview statement), and an attorney with close connections to Giuliani told Cohen in an email that the President's legal team was "'in our corner,'" *id.* Vol. II at 147. Cohen "recalled discussing the possibility of a pardon with the President's personal counsel," and President Trump "indicated in his public statements that a pardon had not been ruled out." *Id.* Vol. II at 154. After Cohen began cooperating, however, the President accused Cohen of fabricating events, called him a "'rat,'" and "on multiple occasions publicly suggested that Cohen's family members had committed crimes." *Id.* The Special Counsel found evidence that "the President intended to discourage Cohen from cooperating with the government because Cohen's information would shed adverse light on the President's campaign-period conduct and statements." *Id.* Vol. II at 155.

President Trump refused to agree to an interview with the Special Counsel's office despite a year's worth of overtures and despite being advised that an interview was "vital to [the] investigation." *Id.* App. C-1. He agreed only to provide written responses to questions about Russia-related topics, but not about potential acts of obstruction. The Special Counsel's office thereafter informed the President's counsel that his limited responses were "insufficien[t] . . . in several respects," including because the President stated on more than 30 occasions that he could not recall various events and gave other answers that were "incomplete or imprecise." *Id.* The

President nonetheless refused again to sit for an interview. *Id.* App. C-1 – C-2.

## **B. The Judiciary Committee’s Investigation**

### **1. The Committee’s Jurisdiction**

The Constitution assigns each House of Congress the authority to “determine the Rules of its Proceedings.” U.S. Const. Art. I, § 5, cl. 2. Pursuant to this authority, the 116th Congress adopted the Rules of the House of Representatives (House Rules), which govern the House during its two-year term. *See* H. Res. 6, 116th Cong. (2019) (adopting House Rules).

House Rule X establishes the “standing committees” of the House, including the Committee on the Judiciary, and assigns each committee “jurisdiction and related functions” regarding legislation and oversight within their respective subject areas. House Rule X.1, X.2. The Judiciary Committee’s jurisdiction includes “[t]he judiciary and judicial proceedings, civil and criminal”; “[c]riminal law enforcement and criminalization”; “[p]residential succession”; and “[s]ubversive activities affecting the internal security of the United States.” *Id.* X.1(l)(1), (7), (15), (19). Among other legislative subjects, the Committee exercises jurisdiction regarding the criminal laws of the United States.<sup>3</sup> Additionally, the Committee exercises jurisdiction regarding the structure and functions of the Department of Justice, including legislation regarding independent counsels and special counsels.<sup>4</sup>

The Committee’s jurisdiction also includes consideration of articles of impeachment. *Jefferson’s Manual* explains that “resolutions . . . that directly call for the impeachment of an

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<sup>3</sup> *See, e.g.*, H.R. Rep. No. 91-1549 (1970) (discussing the Committee’s consideration of the Organized Crime Control Act, Pub. L. No. 91-452 (1970)).

<sup>4</sup> *See, e.g.*, H.R. Rep. No. 103-224 (1993) (describing the Committee’s consideration of legislation to reauthorize the independent counsel statute); 165 Cong. Rec. H208 (daily ed. Jan. 3, 2019) (referral of H.R. 197, the “Special Counsel Independence and Integrity Act,” 116th Cong., to the Committee).

officer have been referred to the Committee on the Judiciary.” H. Doc. 114-192 § 605, at 321 (2017). Upon their introduction, resolutions of impeachment are referred directly to the Committee by the Speaker of the House just as proposed legislation is referred by the Speaker to committees of appropriate jurisdiction. *See* House Rule XII.2(a) (“The Speaker shall refer each bill, resolution, or other matter that relates to a subject listed under a standing committee named in clause 1 of rule X in accordance with the provisions of this clause.”).<sup>5</sup> This long-standing House practice was followed in the 116th Congress when, on January 3, 2019, a resolution calling for the impeachment of President Trump was referred to the Committee for its consideration.<sup>6</sup> The House may also choose to direct a particular manner for investigating grounds for impeachment, and in such instances it has voted to refer such investigations to the Committee.<sup>7</sup> Whether by direct referral to the Committee or referral following a vote, “[a]ll impeachments to reach the Senate since 1900 have been based on resolutions reported by the Committee on the Judiciary.” Charles W. Johnson et al., *House Practice: A Guide to the Rules, Precedents, and Practice of the House*, Ch. 27 § 6, at 615 (2017).

## 2. The Committee’s Investigation and Accommodation Efforts

Beginning in February 2019, Chairman Nadler, Chairman Schiff of the House Permanent

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<sup>5</sup> *See, e.g.*, 163 Cong. Rec. H9375 (daily ed. Nov. 15, 2017) (referral to the Committee of H. Res. 621, 115th Cong., impeaching President Trump); 163 Cong. Rec. H5759 (daily ed. July 12, 2017) (referral to the Committee of H. Res. 438, 115th Cong., impeaching President Trump); 162 Cong. Rec. H4926 (daily ed. July 13, 2016) (referral to the Committee of H. Res. 828, 114th Cong., impeaching John Koskinen, Commissioner of the Internal Revenue Service); 135 Cong. Rec. 2553 (1989) (referral to the Committee of H. Res. 87, 106th Cong., impeaching Judge Walter Nixon); 133 Cong. Rec. 6522 (1987) (referral to the Committee of H. Res. 138, 105th Cong., impeaching Judge Alcee Hastings).

<sup>6</sup> 165 Cong. Rec. H211 (daily ed. Jan. 3, 2019) (referral to the Committee of H. Res. 13, 116th Cong.).

<sup>7</sup> *See, e.g.*, H. Res. 581, 105th Cong. (1998) (instructing the Committee to investigate grounds for impeachment against President Clinton); H. Res. 803, 93d Cong. (1974) (instructing the Committee to investigate grounds for impeachment against President Nixon).

Select Committee on Intelligence (HPSCI),<sup>8</sup> and the chairs of other committees of relevant jurisdiction alerted Attorney General Barr of the House's need to review the full Mueller Report, once completed, and the underlying evidence and investigative materials produced or obtained by the Special Counsel's office. As the chairs explained, "because the Department has taken the position that a sitting President is immune from indictment and prosecution, Congress could be the only institution currently situated to act on evidence of the President's misconduct."<sup>9</sup> On March 4, 2019, as evidence of the President's potential misconduct continued to be unveiled, the Committee announced it was investigating "threats to the rule of law," with a focus on "alleged obstruction of justice, public corruption, and other abuses of power by President Trump, his associates, and members of his Administration."<sup>10</sup> Chairman Nadler emphasized the urgency of this inquiry given that "senior Justice Department officials have suggested that they may conceal

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<sup>8</sup> HPSCI is investigating the counterintelligence risks arising from efforts by Russia and other foreign powers to influence the U.S. political process during and since the 2016 election, including links and contacts between individuals associated with the Trump Campaign and the Russian government. HPSCI's jurisdiction includes, among other things, "matters relating to" "[t]he Central Intelligence Agency, the Director of National Intelligence, and the National Intelligence Program," and "[i]ntelligence and intelligence-related activities of all other departments and agencies of the Government, including the tactical intelligence and intelligence-related activities of the Department of Defense." House Rule X.11(b)(1). HPSCI is directed to make "regular and periodic reports to the House on the nature and extent of the intelligence and intelligence-related activities of the various departments and agencies of the United States." House Rule X.11(c)(1). Evidence obtained through HPSCI's investigation will further inform the Judiciary Committee's consideration of whether to recommend articles of impeachment against the President.

<sup>9</sup> Letter to Hon. William P. Barr, Attorney General (Attorney General Barr), from Jerrold Nadler, Chairman, H. Comm. on the Judiciary (Chairman Nadler); Adam Schiff, Chairman, H. Permanent Select Comm. on Intelligence (Chairman Schiff); Elijah Cummings, Chairman, H. Comm. on Oversight and Reform; Elliot Engel, Chairman, H. Comm. on Foreign Affairs; Maxine Waters, Chairwoman, H. Comm. on Financial Servs.; and Richard Neal, Chairman, H. Comm. on Ways and Means, at 2 (Feb. 22, 2019) (Apelbaum Decl. Ex. B).

<sup>10</sup> Press Release, House Committee on the Judiciary, *House Judiciary Committee Unveils Investigation Into Threats Against the Rule of Law* (Mar. 4, 2019), online at <https://judiciary.house.gov/news/press-releases/house-judiciary-committee-unveils-investigation-threats-against-rule-law>.

the work of the Special Counsel’s investigation from the public.”<sup>11</sup> As part of these investigative efforts, the Committee issued 81 requests for documents from individuals and entities it believed possessed relevant evidence.<sup>12</sup> On March 14, the House unanimously adopted a resolution calling for the “full release” of the Mueller Report to Congress. H. Con. Res. 24, 116th Cong. (2019).<sup>13</sup> The resolution noted that “the allegations at the center of Special Counsel Mueller’s investigation strike at the core of our democracy” and that “the need for transparency is most pronounced with regard to investigations that involve the President.” *Id.*

The Committee, along with HPSCI and other committees of relevant jurisdiction, persisted in their efforts to obtain access to the full Mueller Report and underlying materials after Special Counsel Mueller delivered the Report to Attorney General Barr on March 22, 2019. On March 25, for example, Chairman Nadler, Chairman Schiff, and the chairs of other committees wrote to Attorney General Barr that “[t]he release of the full report and the underlying evidence and documents is urgently needed by our committees to perform their duties under the Constitution.”<sup>14</sup> Among other things, the chairs noted that “Congress must be permitted to make an independent assessment of the evidence regarding obstruction of justice.”<sup>15</sup> The chairs further urged the Attorney General “to begin the process of consultation with us immediately” to the extent he believed “applicable law limit[ed] [his] ability to comply.”<sup>16</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *See id.*

<sup>13</sup> *See* 165 Cong. Rec. H2731-32 (daily ed. Mar. 14, 2019) (recording votes).

<sup>14</sup> Letter to Attorney General Barr from Chairman Nadler, et al. at 1 (Mar. 25, 2019) (March 25 Letter) (Apelbaum Decl. Ex. C); *see also* Letter to Attorney General Barr from Chairman Nadler et al. (Apr. 1, 2019) (April 1 Letter) (Apelbaum Decl. Ex. D) (reiterating the urgency of the House’s request for these materials and describing legal bases supporting the House’s right to access them).

<sup>15</sup> March 25 Letter at 2.

<sup>16</sup> *Id.* at 3.

On March 27, 2019, Chairman Schiff and Ranking Member Nunes of HPSCI separately wrote to Attorney General Barr, Deputy Attorney General Rosenstein, and FBI Director Christopher Wray requesting that the Department and the FBI provide “all materials, regardless of form and classification, obtained or produced by the Special Counsel’s Office in the course of the investigation,” including those relating to “intelligence or counterintelligence-related information.”<sup>17</sup> Chairman Schiff and Ranking Member Nunes noted that “[a]s the congressional committee of the House of Representatives charged with oversight of intelligence and counterintelligence matters, the Committee has an independent constitutional duty and express statutory right to examine the intelligence and counterintelligence information gathered by the Special Counsel’s Office, assess the counterintelligence and national security implications, and formulate appropriate remedies in response.”<sup>18</sup>

On April 18, 2019, Attorney General Barr publicly released a redacted version of the Mueller Report. On April 19, Chairman Nadler issued a subpoena to Attorney General Barr for an unredacted version of the Report, the documents cited therein, and other evidence and investigative materials produced or obtained by the Special Counsel’s office.<sup>19</sup>

Concurrently, the Committee endeavored to obtain live testimony from key witnesses cited in the Mueller Report. On April 22, Chairman Nadler issued a subpoena to McGahn, whom the

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<sup>17</sup> Letter to Attorney General Barr, et al., from Chairman Schiff and Devin Nunes, Ranking Member, H. Permanent Select Comm. on Intelligence (Ranking Member Nunes), at 2 (Mar. 27, 2019) (Apelbaum Decl. Ex. E). On April 25, 2019, Chairman Schiff and Ranking Member Nunes wrote to Attorney General Barr, Deputy Attorney General Rosenstein, and Director Wray reiterating this request for “all classified and unclassified evidence and information obtained or generated by the Special Counsel’s Office that may relate to foreign intelligence or counterintelligence matters,” including those gathered “through grand jury process.” Letter to Attorney General Barr from Chairman Schiff and Ranking Member Nunes at 2 (April 25, 2019) (Apelbaum Decl. Ex. F).

<sup>18</sup> *Id.* at 1-2.

<sup>19</sup> Subpoena to Attorney General Barr (Apr. 19, 2019) (Apelbaum Decl. Ex. G).

Report revealed to be the most critical fact witness to the Special Counsel's investigation of obstruction of justice by President Trump. The subpoena required production of 36 categories of documents as well as McGahn's testimony before the Committee.<sup>20</sup> In the ensuing days, in response to questions about this and other efforts by congressional committees to conduct oversight, President Trump declared, "We're fighting all the subpoenas,"<sup>21</sup> and "I don't want people testifying."<sup>22</sup> Several weeks later, the President "directed" McGahn not to comply with the Committee's subpoena for testimony on the ground that he is "absolutely immune" from having to do so.<sup>23</sup> The President subsequently made a similar claim of "absolute immunity" with regard to former White House communications director Hope Hicks.<sup>24</sup>

On May 1, the Department indicated that it did not intend to comply with the Committee's subpoena for the full Mueller Report and underlying materials, including because it did not believe Federal Rule of Criminal Procedure 6(e) permits disclosure of grand jury materials in these circumstances and because the request for underlying materials included a large volume of documents.<sup>25</sup> The Committee initiated contempt proceedings against Attorney General Barr, but Chairman Nadler also informed the Department that the Committee remained "willing to negotiate

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<sup>20</sup> Subpoena to Donald F. McGahn II (Apr. 22, 2019) (Apelbaum Decl. Ex. H).

<sup>21</sup> Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight Over Powers*, N.Y. TIMES (Apr. 24, 2019), online at <https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html>.

<sup>22</sup> Robert Costa et al., *Trump Says He Is Opposed to White House Aides Testifying to Congress, Deepening Power Struggle with Hill*, WASH. POST (Apr. 23, 2019), online at [https://www.washingtonpost.com/politics/trump-says-he-is-opposed-to-white-house-aides-testifying-to-congress-deepening-power-struggle-with-hill/2019/04/23/0c7bd8dc-65e0-11e9-8985-4cf30147bdca\\_story.html?utm\\_term=.a8cb1389537b](https://www.washingtonpost.com/politics/trump-says-he-is-opposed-to-white-house-aides-testifying-to-congress-deepening-power-struggle-with-hill/2019/04/23/0c7bd8dc-65e0-11e9-8985-4cf30147bdca_story.html?utm_term=.a8cb1389537b)

<sup>23</sup> Letter to Chairman Nadler from Pat Cipollone, Counsel to the President, at 1 (May 20, 2019) (Apelbaum Decl. Ex. I).

<sup>24</sup> See Letter to Chairman Nadler from Pat Cipollone, Counsel to the President, at 1 (June 18, 2019) (Apelbaum Decl. Ex. J).

<sup>25</sup> See Letter to Chairman Nadler from Stephen E. Boyd, Assistant Attorney General, U.S. Department of Justice (AAG Boyd) (May 1, 2019) (May 1 Letter) (Apelbaum Decl. Ex. K).

a reasonable accommodation,” including by ensuring safe storage of any unredacted portions of the Mueller Report and by “prioritize[ing] a specific, defined set of underlying investigative and evidentiary materials for immediate production.”<sup>26</sup> With respect to Rule 6(e) materials, Chairman Nadler requested that the Department work with the Committee to obtain a court order permitting disclosure of relevant materials and noted that courts have permitted such disclosures to Congress in the past.<sup>27</sup> However, on the evening before the Committee’s scheduled contempt vote, the Department effectively broke off those negotiations by notifying the Committee that the Attorney General planned to “request that the President invoke executive privilege with respect to the materials subject to the subpoena.”<sup>28</sup>

On May 8, 2019, the Committee voted to approve a resolution recommending that Attorney General Barr be held in contempt of Congress. *See* H.R. Rep. No. 116-105 (2019) (Contempt Report). The Contempt Report explains that the purposes of the Committee’s ongoing investigation include: “(1) investigating and exposing any possible malfeasance, abuse of power, corruption, obstruction of justice, or other misconduct on the part of the President or other members of his Administration; (2) considering whether the conduct uncovered may warrant amending or creating new federal authorities, including among other things, relating to election security, campaign finance, misuse of electronic data, and the types of obstructive conduct that the Mueller Report describes; and (3) considering whether any of the conduct described in the Special Counsel’s Report warrants the Committee in taking any further steps under Congress’ Article I powers,” including approval of “articles of impeachment.” *Id.* at 13.

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<sup>26</sup> Letter to Attorney General Barr from Chairman Nadler at 1-2 (May 3, 2019) (“May 3 Letter”) (Apelbaum Decl. Ex. L).

<sup>27</sup> *Id.*

<sup>28</sup> Letter to Chairman Nadler from AAG Boyd at 2 (May 7, 2019) (Apelbaum Decl. Ex. M).



Also on May 8, 2019, Chairman Schiff issued a subpoena to Attorney General Barr for (1) an unredacted version of the Mueller Report; (2) all documents and materials referenced in the unredacted Report, including grand jury materials; and (3) all documents and materials obtained or generated by the Special Counsel's office during its investigation referring or relating to (a) any foreign individuals or entities of any type, (b) any persons or entities associated with or acting in any capacity as a representative, agent, or proxy for any such foreign individuals or entities, (c) any communications, interactions, or links between or about U.S. persons and such foreign individuals or entities, and (d) any effort to influence, impede, or obstruct congressional investigations.<sup>29</sup>

After the Judiciary Committee's May 8 contempt vote, the Committee continued to engage in repeated efforts to accommodate Attorney General Barr's stated concerns, including by substantially narrowing its requests for underlying materials to a specific list of critical documents that are cited in the Mueller Report and are not subject to Rule 6(e).<sup>30</sup> HPSCI engaged in a similar accommodation process with the Department to focus its request for underlying materials relating to intelligence and counterintelligence information. After much negotiation, the Department began producing some of those underlying documents to HPSCI on May 24, 2019, and to the Judiciary Committee on June 10, 2019. The Judiciary Committee and HPSCI continue to engage in accommodation efforts with the Department regarding the scope and terms of their respective access to these documents. Additionally, although the Department has allowed Judiciary Committee Members to review on a confidential basis portions of Volume II of the Mueller Report

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<sup>29</sup> See Letter to Attorney General Barr from Chairman Schiff at 3 (May 8, 2019) (Apelbaum Decl. Ex. N).

<sup>30</sup> See Letter to Attorney General Barr and Pat Cipollone, Counsel to the President, from Chairman Nadler (May 24, 2019) (Apelbaum Decl. Ex. O).

that were redacted for reasons other than Rule 6(e), including where information relates to ongoing law enforcement matters, it has not done so with respect to Volume I. Conversely, the Department has allowed HPSCI Members to review on a confidential basis portions of Volume I of the Mueller Report that were redacted for reasons other than Rule 6(e), but it has not done so with respect to Volume II. The Judiciary Committee and HPSCI continue to seek access to these portions of the Mueller Report, with the aim that the Department permit all Judiciary Committee and HPSCI Members and certain staff to review the full Mueller Report except for those portions redacted pursuant to Rule 6(e).

With respect to Rule 6(e) materials, the Department on numerous prior occasions has cooperated with the Judiciary Committee and with the House of Representatives to seek permission from courts for disclosure of grand jury materials, including in several matters involving allegations of Presidential misconduct. For example, the Department zealously advocated for disclosure of the Watergate grand jury's report to this Committee, informing the court that "[t]he 'need' for the House to be able to make its profoundly important judgment on the basis of all available information is as compelling as any that could be conceived." Mem. for the United States on Behalf of the Grand Jury at 16, *In re Report & Rec. of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Reps. (Haldeman Brief)*, Misc. No. 74-21, 370 F. Supp. 1219 (D.D.C. Mar. 5, 1974) (Apelbaum Decl. Ex. P). The Department also advocated for disclosure of grand jury materials in the context of numerous independent counsel investigations,<sup>31</sup> as well as in circumstances involving other investigations of official

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<sup>31</sup> *In re Madison Guaranty Savings & Loan Assoc.*, Div. No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998) (Apelbaum Decl. Ex. Q) (granting Independent Counsel Kenneth Starr's request to disclose report and underlying grand jury materials to the House); *In re Cisneros*, 426 F.3d 409, 415 (D.C. Cir. Spec. Div. 2005) (granting Independent Counsel's request to disclose report to Congress, including grand jury information); *In re Espy*, 259 F.3d 725 (D.C. Cir. Spec. Div.

misconduct.<sup>32</sup>

Chairman Nadler has repeatedly asked Attorney General Barr to follow that practice and “join with the House Judiciary Committee in seeking expedited disclosure of any Rule 6(e) material to Congress.”<sup>33</sup> Nevertheless, the Department has taken the position in this instance that “Rule 6(e) contains no exception that would permit the Department to provide grand-jury information to the Committee in connection with its oversight role,”<sup>34</sup> and it has not accepted the Committee’s request to jointly seek the Court’s permission for disclosure of Rule 6(e) materials.<sup>35</sup> As a result, the Committee currently lacks access to all portions of the Mueller Report that the Department redacted based on Rule 6(e). Those portions include passages describing the June 9, 2016 meeting at Trump Tower between senior Trump Campaign officials and representatives of the Russian government, Mueller Report Vol. I at 111-12, 117, 120; Manafort’s efforts to share internal campaign polling data with a person whom the FBI assesses has ties to Russian intelligence, *id.* Vol. I at 136-37, 140; and a possible attempt by the Special Counsel’s office to obtain testimony from Donald Trump, Jr. during the midst of the President’s various efforts to remove or limit the Special Counsel’s investigation, *id.* Vol. II at 105. The Committee also lacks

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2001) (granting Independent Counsel’s request to release report to the public, including grand jury materials); *In re North*, 16 F.3d 1234 (D.C. Cir. Spec. Div. 1994) (same, with respect to report regarding the Iran-Contra affair).

<sup>32</sup> See, e.g., H.R. Rep. No. 111-427 at 10 (2010) (the Department “filed a memorandum in support of” the Committee’s petition to access grand jury material for its investigation regarding Judge G. Thomas Porteous); *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1441-42 (11th Cir. 1987) (the Department “stated that it has ‘no objection’” to disclosure of grand jury materials to the Committee for its investigation regarding Judge Alcee Hastings).

<sup>33</sup> April 1 Letter App. 7; see also, e.g., Letter to Attorney General Barr from Chairman Nadler at 1 (Apr. 11, 2019) (Apelbaum Decl. Ex. R); May 3 Letter at 2.

<sup>34</sup> May 1 Letter, at 4.

<sup>35</sup> See Letter to Chairman Nadler from AAG Boyd at 1 (May 6, 2019) (Apelbaum Decl. Ex. S).

access to any underlying grand jury materials obtained by the Special Counsel's office, including materials cited in the Report and any other materials that may shed light on the President's knowledge about any links between his campaign and Russia's election interference activities, or that relate to McGahn's role in the Trump Campaign or in the President's efforts to undermine the investigation.<sup>36</sup>

### **C. Procedural Background and Requested Relief**

On June 11, 2019, the House voted to approve House Resolution 430, which authorizes the Committee to initiate civil litigation seeking, *inter alia*, McGahn's compliance with his subpoena for testimony and documents, and disclosure of any grand jury material related to the Mueller Report, including "pursuant to . . . Rule 6(e)(3)(E)." The Resolution also authorizes the Committee to initiate litigation compelling compliance with the subpoena issued to Attorney General Barr for the full contents of the Mueller Report and for underlying evidence and materials, should that become necessary.

H. Res. 430 confirms this Committee's investigatory authority, stating that the Committee "has any and all necessary authority under Article I of the Constitution" in connection with these proceedings. The accompanying report by the House Committee on Rules explains that this authority is intended to facilitate the Committee's ongoing investigation, whose purpose includes

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<sup>36</sup> Despite repeated requests by Chairman Schiff, the Department has also refused to provide HPSCI with access to any grand jury materials obtained by the Special Counsel's office, including those relating to foreign intelligence or counterintelligence information to which HPSCI has a statutory right of access. *See* 50 U.S.C. § 3092 (requiring, among other things, that the heads of all departments, agencies, or entities of the United States government involved in intelligence activities keep the Congressional intelligence committees fully and currently informed of all intelligence activities, and to furnish to the Congressional intelligence committees any information or material concerning intelligence activities which is within the custody or control of the departments, agencies, or entities of the United States government); *see also id.* § 3003 (defining "intelligence" to include "foreign intelligence" and "counterintelligence").

assessing “whether to recommend ‘articles of impeachment with respect to the President or any other Administration official.’” H.R. Rep. No. 116-108, at 21 (2019) (Rules Committee Report) (quoting Contempt Report at 13). The report further notes that the authorities granted by H. Res. 430 are necessary in light of “widespread and credible allegations of misconduct and abuse of power by President Trump as well as the President’s extreme if not unprecedented actions seeking to cover up and obstruct committee investigations.” *Id.* at 20.

Concurrently, the Committee began holding a series of hearings regarding the Mueller Report’s findings, including a hearing in which former prosecutors testified about the significance of the President’s actions and evidence that they constituted obstruction of justice.<sup>37</sup> On July 11, 2019, Chairman Nadler issued a memorandum in connection with a hearing the following day stating that “[t]he Committee seeks key documentary evidence and intends to conduct hearings with Mr. McGahn and other critical witnesses testifying to determine whether the Committee should recommend articles of impeachment against the President or any other Article I remedies, and if so in what form.” July 11 Memorandum at 3. At the hearing, Chairman Nadler stated in his opening remarks that that it was the Committee’s “responsibility to determine whether to recommend articles of impeachment against the President” and that “articles of impeachment are under consideration as part of the Committee’s investigation.”<sup>38</sup> Chairman Nadler has reiterated the purposes of the Committee’s investigation in other Committee memoranda and statements as well, including the Committee’s aim of assessing “whether to approve articles of impeachment.” *See, e.g.,* Jerrold Nadler, Chair, H. Comm. on the Judiciary, *Memorandum Re: Hearing on*

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<sup>37</sup> *See Lessons from the Mueller Report: Presidential Obstruction and Other Crimes: Hearing Before the H. Comm. on the Judiciary* (June 10, 2019).

<sup>38</sup> *Lessons from the Mueller Report, Part III: “Constitutional Processes for Addressing Presidential Misconduct”: Hearing Before the H. Comm. on the Judiciary* (July 12, 2019), Tr. at 4 (July 12 Hearing Transcript) (Apelbaum Decl. Ex. T).

*“Lessons from the Mueller Report, Part II: Bipartisan Perspectives,”* at 3 (June 19, 2019) (Apelbaum Decl. Ex. U).

On July 24, 2019, Special Counsel Mueller appeared before the Committee and reaffirmed the central evidence of obstruction of justice documented in Volume II of the Report.<sup>39</sup> He emphasized that “[o]bstruction of justice strikes at the core of the government’s effort to find the truth and to hold wrongdoers accountable,” and he agreed that the Report did not exonerate the President of those potential crimes.<sup>40</sup> Later the same day, Special Counsel Mueller appeared before HPSCI and testified about the “Russian Government’s efforts to interfere in our election,” which Special Counsel Mueller described as among the “most serious” of the challenges to our democracy that he had ever encountered during the course of his long career.<sup>41</sup> Special Counsel Mueller further testified about efforts by President Trump and his associates to obstruct the Special Counsel’s investigation, and he expressed his agreement that the President’s written responses to questions posed by the Special Counsel’s Office were “generally” not only “inadequate and incomplete,” but also “showed that he wasn’t always being truthful.”<sup>42</sup>

On July 26, Chairman Nadler issued protocols to protect the confidentiality of any grand jury materials disclosed to the Committee. *See* Jerrold Nadler, Chairman, H. Comm. on the Judiciary, “House Judiciary Committee Procedures for Handling Grand Jury Information” (Grand

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<sup>39</sup> *Oversight of the Report on the Investigation Into Russian Interference in the 2016 Presidential Election: Former Special Counsel Robert S. Mueller, III: Hearing before the H. Comm. on the Judiciary* (July 24, 2019), Tr. at 14 (Apelbaum Decl. Ex. V) (“In writing the report, we stated the results of our investigation with precision. . . . [T]he report is my testimony[.]”)

<sup>40</sup> *Id.* at 13, 16.

<sup>41</sup> *Former Special Counsel Robert S. Mueller, III on the Investigation into Russian Interference in the 2016 Presidential Election: Hearing before the H. Permanent Select Comm. on Intelligence* (July 24, 2019), Tr. at 13 (Apelbaum Decl. Ex. W).

<sup>42</sup> *Id.* at 82-84.

Jury Handling Procedures) (Apelbaum Decl. Ex. X). The Grand Jury Handling Procedures require any grand jury materials obtained by the Committee to be stored in a secure area with access limited to Members of the Committee, certain designated staff, and Members of HPSCI and their designated staff. Grand jury materials cannot be publicly disclosed absent a majority vote by the Judiciary Committee. In light of the nature of the Special Counsel's investigation and HPSCI's jurisdiction over intelligence and counterintelligence-related matters, the Judiciary Committee will seek HPSCI's assistance in reviewing grand jury materials and other evidence and in assessing whether to recommend articles of impeachment against the President. Given HPSCI's ability to handle the most sensitive classified information, it is well-equipped to protect the confidentiality of grand jury materials.

In the instant application, the Committee seeks access to: (1) all portions of the Mueller Report that were redacted pursuant to Rule 6(e); (2) any underlying transcripts or exhibits referenced in the portions of the Mueller Report that were redacted pursuant to Rule 6(e); and (3) transcripts of any underlying grand jury testimony and any grand jury exhibits that relate directly to (A) President Trump's knowledge of efforts by Russia to interfere in the 2016 U.S. Presidential election; (B) President Trump's knowledge of any direct or indirect links or contacts between individuals associated with his Presidential campaign and Russia, including with respect to Russia's election interference efforts; (C) President Trump's knowledge of any potential criminal acts by him or any members of his administration, his campaign, his personal associates, or anyone associated with his administration or campaign; or (D) actions taken by McGahn during the campaign, the transition, or McGahn's period of service as White House Counsel.

## ARGUMENT

### I. THE COURT SHOULD AUTHORIZE DISCLOSURE OF THE REQUESTED MATERIALS PURSUANT TO RULE 6(e)'S "JUDICIAL PROCEEDING" EXCEPTION

Rule 6(e)(3)(E)(i) gives the court charged with overseeing a grand jury the ability to permit disclosure of grand jury materials "preliminarily to or in connection with a judicial proceeding." The party seeking access to grand jury materials must show a "particularized need" for those materials, meaning: "(1) '[the] material sought is needed to avoid a possible injustice in another judicial proceeding'; (2) 'the need for disclosure is greater than the need for continued secrecy'; and (3) 'the request is structured to cover only material so needed.'" *In re Sealed Case*, 801 F.2d 1379, 1381 (D.C. Cir. 1986) (quoting, *inter alia*, *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 222 (1979)) (brackets omitted). The Committee's ongoing investigation is "preliminar[y] to" a judicial proceeding because the Committee is considering whether to recommend articles of impeachment. The Committee's request readily satisfies each of the requirements needed to demonstrate particularized need.

#### A. The Committee Seeks To Use Grand Jury Materials "Preliminarily to" a "Judicial Proceeding"

The D.C. Circuit has squarely held that when this Committee is conducting an investigation regarding impeachment, a request for Rule 6(e) materials for use in that investigation "fit[s] within the Rule 6 exception for 'judicial proceedings.'" *McKeever v. Barr*, 920 F.3d 842, 847 n.3 (D.C. Cir. 2019), *pet. for reh'g denied*, No. 17-5149 (July 22, 2019). Because the Committee now seeks grand jury materials "to determine whether [it] should recommend articles of impeachment against the President," July 11 Memorandum at 3, the "judicial proceeding" exception applies as a matter of binding Circuit precedent.



### **1. An Investigation Regarding Impeachment Is Preliminary to a “Judicial Proceeding”**

In *McKeever*, the court addressed its prior en banc decision in *Haldeman v. Sirica*, 501 F.2d 714 (1974), in which the court stated its “general agreement with [Judge Sirica’s] handling” of this Committee’s request for the Watergate grand jury’s report and underlying evidence, and accordingly denied a petition for mandamus. *Haldeman*, 501 F.2d at 715. In his decision below, Judge Sirica authorized disclosure of the Watergate grand jury’s report and accompanying evidence to this Committee for use in its investigation regarding the potential impeachment of President Nixon. *Haldeman*, 370 F. Supp. 1219. Judge Sirica discussed Rule 6(e)’s “judicial proceeding” exception, noting that the exception has been applied in instances such as disbarment proceedings and police disciplinary investigations, and observing that “it seems incredible that grand jury matters should lawfully be available” in those contexts “and yet be unavailable to the House of Representatives in a proceeding of so great import as an impeachment investigation.” *Id.* at 1230; *see id.* at 1228-29 & nn. 39, 41 (citing *Jachimowski v. Conlisk*, 490 F.2d 895 (7th Cir. 1973) and *Doe v. Rosenberry*, 255 F.2d 118, 120 (2d Cir. 1958)). Judge Sirica further noted that “[i]t would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information.” *Id.* at 1230.

The D.C. Circuit, sitting en banc, denied the Watergate defendants’ petition for mandamus. *Haldeman*, 501 F.2d 714. Although the majority did not specify upon which Rule 6(e) exception it relied, Judge MacKinnon noted in a separate opinion that the prosecutor representing the Justice Department had stated at oral argument “that this disclosure of grand jury material to the House Judiciary Committee and eventually possibly to the House and Senate is being made ‘preliminarily to (and) in connection with a judicial proceeding.’” *Id.* at 717. Judge MacKinnon wrote that his “concurrence . . . has taken this representation into consideration.” *Id.* In *McKeever*, the court

resolved all doubt about the basis for the holding in *Haldeman*, concluding that it “read[s] *Haldeman* as did Judge MacKinnon . . . as fitting within the Rule 6 exception for ‘judicial proceedings.’” 920 F.3d at 847 n.3.

Because the court in *McKeever* and *Haldeman* held that an impeachment investigation by this Committee qualifies as “preliminar[y] to or in connection with a judicial proceeding,” it necessarily follows, at the least, that a Senate trial constitutes the requisite “judicial proceeding.” As another court has explained, “[t]here can be little doubt that an impeachment trial by the Senate is a ‘judicial proceeding’ in every significant sense.” *In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami)*, 669 F. Supp. 1072, 1075 (S.D. Fla. 1987) (*Hastings*). In *Hastings*, this Committee sought grand jury material from a district court in the course of investigating and considering an impeachment resolution against then-Judge Alcee Hastings. As the court explained, the text of the Constitution makes clear that a Senate impeachment trial is “judicial” in character: Article III, Section 3 states that “[t]he *trial* of all Crimes, except in *Cases* of Impeachment, shall be by Jury.” *Id.* at 1076 (emphases added). Article I, Section 3 likewise refers to the power of the Senate “to *try* all impeachments” and refers to “[j]udgment in cases of impeachment.” *Id.* (emphases added).

As the court further noted, “[t]he fact that senators rather than Article III judges decide the case does not make it any less judicial; it merely points to a jurisdictional choice made by the framers for political and historical reasons.” *Id.* The court also observed that the Supreme Court has described the Senate as “exercis[ing] the judicial power of trying impeachments.” *Id.* at 1076 (quoting *Kilbourn v. Thompson*, 103 U.S. (13 Otto) 168, 191 (1880)).<sup>43</sup> As such, the court held in

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<sup>43</sup> Indeed, years later during President Clinton’s impeachment trial, Chief Justice Rehnquist stated that Senators should not be referred to as “jurors” because the Senate “is not simply a jury; it is a court in this case.” Laurence Tribe & Joshua Matz, *TO END A PRESIDENCY*:

*Hastings* that “a House investigation preliminary to impeachment is within the scope of the Rule.” 669 F. Supp. at 1075. On appeal, the parties agreed. *In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1440-41 (11th Cir. 1987).

When this Committee conducts an investigation with the purpose of determining whether to recommend articles of impeachment, that process is “preliminar[y] to” an impeachment trial under *McKeever* and *Haldeman*.<sup>44</sup> The very purpose of such an investigation is to determine whether to recommend that the House vote to impeach the accused party, resulting in a trial in the Senate. To be sure, the anticipated use of grand jury material must “relate[] fairly directly to” the anticipated judicial proceeding, as it does here. *United States v. Baggot*, 463 U.S. 476, 480 (1983). In *Baggot*, the Supreme Court held that a tax auditing procedure conducted by the Internal Revenue Service (IRS) does not qualify as “preliminar[y] to or in connection with a judicial proceeding” under Rule 6(e), noting that “it is not enough to show that some litigation may emerge from the matter in which the material is to be used.” *Id.* *McKeever*, however, postdates *Baggot*; as such, the D.C. Circuit has necessarily concluded that an impeachment investigation by this Committee meets *Baggot*’s standard for a “fairly direct[]” relation to a judicial proceeding. Otherwise, the court could not have “read *Haldeman* . . . as fitting within the Rule 6 exception for ‘judicial proceedings.’” *McKeever*, 920 F.3d at 847 n.3.

Additionally, the circumstances presented in *Baggot* are readily distinguishable. As the Court explained, an IRS audit only results in litigation if (1) the IRS finds a deficiency and moves to collect the amount owed; *and* (2) the taxpayer chooses to initiate a judicial challenge to the

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<sup>44</sup> The only alternative would be to construe *McKeever* and *Haldeman* to mean that the Committee’s investigation is itself the requisite “judicial proceeding” and that its use of grand jury material would be “in connection with” that proceeding. Under that framework, the Committee’s present request for grand jury materials would plainly qualify as well.

IRS's actions. *Baggot*, 463 U.S. at 481. The Court further observed that the IRS's decision with regard to a deficiency "is largely self-executing," because the IRS has its own authority to collect payments without resort to a court. *Id.* By contrast, when the Judiciary Committee is assessing whether to recommend articles of impeachment, its recommendation, if subsequently ratified by the full House, would necessarily trigger an impeachment trial in the Senate. Thus, unlike in *Baggot*, the anticipated "judicial proceeding" is not merely a collateral possibility that could ensue if some other entity chooses to challenge the Committee's or the House's actions.

## **2. The Judiciary Committee Is Investigating Whether To Recommend Articles of Impeachment**

The House is constitutionally empowered to determine the rules of its own proceedings, including any rules governing impeachment proceedings or any prerequisites for commencing such proceedings. U.S. Const. Art. I, § 5, cl. 2. In assessing the Committee's intended use of grand jury materials, this Court should afford great weight to the manner in which the House chooses to exercise its "sole power of impeachment." U.S. Const. Art. I, § 2, cl. 5. *Cf. Nixon v. United States*, 506 U.S. 224 (1993) (the question whether the Senate's rules for trying impeachments comport with the Constitution's Impeachment Trial Clause, Art. I, § 3, cl. 6, is non-justiciable); *Nat'l Labor Relations Bd. v. Noel Canning*, 573 U.S. 513, 552 (2014) (the Court must "give great weight to the Senate's own determination of when it is and it is not in session" for purposes of the Recess Appointments Clause). Where, as here, the Committee is conducting an investigation whose purposes include determining whether to recommend articles of impeachment, that is more than sufficient for purposes of Rule 6(e)'s "judicial proceeding" exception.

The Committee has repeatedly made clear that it is assessing "whether to approve articles of impeachment with respect to the President." Contempt Report at 13; *see* Rules Committee

Report at 21. Articles of impeachment have been introduced and referred to the Committee during the present Congress, *see* H. Res. 13, and Chairman Nadler recently confirmed that they are “under consideration as part of the Committee’s investigation.” July 11 Memorandum at 3. Chairman Nadler has also reiterated the Committee’s “responsibility to determine whether to recommend articles of impeachment against the President,”<sup>45</sup> and he has stated that the Committee seeks grand jury information to aid its determination of “whether the Committee should recommend articles of impeachment against the President.” July 11 Memorandum at 3. Moreover, the full House has specifically authorized the Committee to seek disclosure of grand jury materials “pursuant to Federal Rule of Criminal Procedure 6(e), including Rule 6(e)(3)(E).” H. Res. 430. It has therefore expressly ratified this Committee’s use of the “judicial proceeding” exception before this Court. *See* Rules Committee Report at 22 (“this resolution . . . authorizes the Judiciary Committee to assert in court that it is seeking information preliminary to a judicial proceeding”).

Because the Committee seeks Rule 6(e) materials to further its ongoing investigation and assessment of whether to recommend articles of impeachment, it is in the same posture as the Judiciary Committee was in *Haldeman* when the court ordered disclosure of the requested records pursuant to Rule 6(e). Here, as in *Haldeman*, a specially appointed prosecutor has produced extensive evidence of misconduct by a sitting President. And here, as in *Haldeman*, the Department has adopted the view that a sitting President cannot be indicted<sup>46</sup>—while the specially appointed prosecutor has acknowledged the importance of Congress’s own “constitutional processes for addressing presidential misconduct.” Mueller Report, Vol. II at 1 (citing

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<sup>45</sup> July 12 Hearing Transcript at 4.

<sup>46</sup> *See* Mem. from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution While in Office* (Sept. 24, 1973); *A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000).

Impeachment Clauses of the Constitution). The Committee, just as it did in *Haldeman*, is investigating whether to recommend articles of impeachment and requires access to Rule 6(e) materials in furtherance of that investigation. *See* 370 F. Supp. at 1221 & n.4 (citing March 8, 1974 letter from Peter W. Rodino, Chairman, H. Comm. on the Judiciary) (Rodino Letter) (Apelbaum Decl. Ex. Y).

Additionally, although the House has not considered a formal resolution structuring any particular proceedings by this Committee, as it had in *Haldeman*, such a resolution is not a necessary predicate to consideration of articles of impeachment. Article I of the Constitution states no such requirement. Where, as here, a Member has introduced articles of impeachment and those articles have been referred to the Committee, the Committee is fully empowered to conduct an investigation and exercise any other of its standing authorities. *See supra* pp. 12-13 & n.5.

The Committee did precisely that in *Hastings*: Following a referral by the Judicial Conference of the United States, a Member of the Committee introduced a resolution to impeach Judge Hastings, which was referred to the Committee. *See* H. Res. 128, 100th Cong. (1987); 133 Cong. Rec. 6522 (1987). The Committee then petitioned the court for access to grand jury materials, and the court determined that Rule 6(e)'s "judicial proceeding" exception authorized disclosure to the Committee. *Hastings*, 669 F. Supp. at 1074-76.<sup>47</sup> The Committee subsequently recommended articles of impeachment against Judge Hastings. *See* H.R. Rep. No. 100-810 (1988).

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<sup>47</sup> The Committee requested grand jury materials from the district court on July 15, 1987. *Hastings*, 669 F. Supp. at 1074. Both before and after that date, the House authorized various allocations of funds and other authorities for the Committee to conduct its investigation. However, none of these resolutions expressly mentioned impeachment. *See, e.g.*, H. Res. 134, 100th Cong. (Mar. 30, 1987) (authorizing \$300,000 in funds for investigations with respect to "the certificate of the Chief Justice"—*i.e.*, the referral by the Judicial Conference); H. Res. 320, 100th Cong. (Dec. 2, 1987) (authorizing Committee counsel to take affidavits and depositions); H. Res. 388 (Mar. 16, 1988) (authorizing further funds).

Similarly, following the referral of a resolution containing articles of impeachment against Judge Nixon, the Committee requested and received access to grand jury records from a federal district court and ultimately recommended articles of impeachment. H.R. Rep. No. 101-66, at 13-16.<sup>48</sup>

As *Jefferson's Manual* explains, “[i]n the House various events have been credited with setting an impeachment in motion,” including “charges made on the floor”; “a resolution introduced by a Member and referred to a committee”; or “facts developed and reported by an investigating committee of the House.” *Id.* § 603 at 319; *see also Deschler's Precedents of the United States House of Representatives*, H. Doc. 94-661 Ch. 14 § 5, at 2020 (1977) (“*Deschler*”) (“impeachment proceedings in the House have been initiated” where resolutions of impeachment were “plac[ed] in the hopper”—*i.e.*, introduced by a Member—and “directly impeached federal civil officers”). Such resolutions are then “referred by the Speaker to the Committee on the Judiciary” for consideration. *Id.*; *see also Jefferson's Manual* § 605, at 321. Through this process in recent decades, the Committee has conducted investigations involving resolutions of impeachment against Judges Nixon and Hastings, as well as against Judge Harry E. Claiborne, Internal Revenue Service Commissioner John Koskinen, and Justice William O. Douglas.<sup>49</sup> Indeed, even in the context of the Watergate proceedings, the Committee began conducting proceedings regarding impeachment well before the House adopted a resolution formally

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<sup>48</sup> The Committee’s report cites a district court order dated December 5, 1988, *Nixon v. United States*, Civ. No. H88-0052(G) (S.D. Miss. 1988). H.R. Rep. No. 101-66 at 15 n.46. The order is unpublished and is not available in any online databases, and the Committee’s report does not specify the basis for the court’s actions under Rule 6(e).

<sup>49</sup> *See* H.R. Rep. No. 99-688, at 3-7 (1986) (describing proceedings with respect to Judge Claiborne); *Impeachment Articles Referred on John Koskinen (Part III): Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (1998); *Deschler* Ch. 14 § 5, at 2020 (describing proceedings with respect to Justice Douglas); *see also id.* Ch. 14 § 3, at 1957 (Judiciary Committee created a “special subcommittee . . . to investigate and report on the charges of impeachment against Justice Douglas”).

structuring the investigation. *Deschler* Ch. 14 § 15, at 2171-72 (Parliamentarian’s Note) (prior to adopting such a resolution, the Committee had already “been conducting an investigation into the charges of impeachment against President Nixon” and had “hired special counsel for the impeachment inquiry”); H.R. Rep. No. 93-1305, at 6 (1974) (prior “[r]esolutions to impeach President Richard M. Nixon were introduced by members of the House . . . and referred to the Committee on the Judiciary”).

## **B. The Judiciary Committee Has a Particularized Need for the Requested Grand Jury Materials**

### **1. The Requested Materials Are Needed To “Avoid an Injustice”**

As already noted, the House of Representatives is the only government body that can now hold the President accountable for the conduct described in the Mueller Report—including extensive allegations of obstruction of justice. As Chairman Rodino stated in his letter requesting grand jury materials regarding the Watergate burglary, “[o]ur Constitution intended that matters of such overwhelming national significance . . . should be decided on the basis of the best available evidence and the fullest possible understanding of the facts.” Rodino Letter at 2. Judge Sirica agreed, concluding that “[i]t would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all pertinent information.” *Haldeman*, 370 F. Supp. at 1230. Indeed, the Justice Department took this view as well, stating in its brief that “[t]he ‘need’ for the House to be able to make its profoundly important judgment on the basis of all available information is as compelling as any that could be conceived.” *Haldeman* Brief at 16.

Here, the requested grand jury information is necessary for the Committee to assess the meaning and implications of the Mueller Report, including with regard to the Trump Campaign’s contacts with agents for the Russian government, President Trump’s knowledge of those contacts, and the President’s state of mind when he took various steps to undermine Special Counsel



Mueller’s investigation. Many portions of the Mueller Report describing contacts between Trump Campaign officials and the Russian government contain extensive Rule 6(e) redactions. These redacted passages include descriptions of:

- Events surrounding the June 9, 2016 Trump Tower meeting, Mueller Report Vol. I at 111-12, 117, 120;
- An apparent assessment of whether former Trump Campaign adviser George Papadopoulos told other members of the Campaign about Russia having obtained “dirt” on Secretary Clinton, *id.* Vol. I at 93-94;
- Former Trump Campaign adviser Carter Page’s July 2016 trip to Moscow in which he met with various Russian officials, *id.* Vol. I at 101;
- Manafort’s sharing of internal Campaign polling data with Konstantin Kilimnik, an individual assessed by the FBI to have ties to Russian intelligence, and Manafort’s discussion of a Russia-Ukraine “peace plan” with Kilimnik, *id.* Vol. I at 136-37, 140, 143; and
- A meeting in the Seychelles in January 2017, between Kirill Dmitriev, the director of Russia’s sovereign wealth fund, and Erik Prince, a supporter of the Trump Campaign, in which the two discussed U.S.-Russia relations, *id.* Vol. I at 153-55.

In analyzing President Trump’s actions and whether they constitute obstruction of justice, the Mueller Report states that “the President had a motive to put the FBI’s Russia investigation behind him.” *Id.* Vol. II at 76. Further information in the Report about the above contacts—and, in particular, any information that President Trump knew about them at the time or obtained knowledge about them later—would shed critical light on those motives. Indeed, the Report notes that the evidence “indicate[s] that a thorough FBI investigation would uncover facts about the campaign and the President personally that the President could have understood to be crimes or that would give rise to personal and political concerns.” *Id.* Assessing the President’s knowledge and state of mind about the full scope of events that occurred during the Presidential campaign is critical to the Committee’s ability to determine whether he acted with corrupt intent when he took actions to impede the Special Counsel’s investigation. *See* Mueller Report Vol. II at 9-10

(describing “corrupt intent” as an element of obstruction of justice). As such, the Committee has a compelling interest in reviewing the redacted passages described and in assessing whether they demonstrate or provide any evidence of the President’s awareness about these contacts.

Similarly, if any underlying grand jury testimony indicates that the President had direct knowledge about his campaign aides’ contacts with the Russian government or its agents, that knowledge would shed critical light on the President’s actions to curtail the investigation. For example, one passage of the Mueller Report appears to describe President Trump instructing Manafort to “keep [him] updated” about potential upcoming document dumps by WikiLeaks, and it includes a citation to what may be Manafort’s grand jury testimony. Mueller Report Vol. II at 18 n.27. If Manafort testified before the grand jury about the President asking to keep him “updated” about upcoming document releases by WikiLeaks, the Committee would have an obvious interest in reviewing that testimony. Evidence that President Trump sought out advance knowledge of WikiLeaks’ plans—or any evidence that he in fact *obtained* knowledge about those plans—would be particularly probative as to the President’s motives for concealing his actions and those of others associated with his campaign.

In addition, after several paragraphs describing Donald Trump Jr.’s issuance of an inaccurate public statement on July 8, 2017 about the purpose of the June 9, 2016 Trump Tower meeting, the Mueller Report contains a short paragraph with Rule 6(e) redactions that appears to describe efforts by the Special Counsel’s office to interview Trump Jr. The Report states: “On July 12, 2017, the Special Counsel’s Office [redacted] Trump Jr. [redacted] related to the June 9 meeting and those who attended the June 9 meeting.” Vol. II at 105. The next sentence notes that President Trump had his “follow-up meeting with Lewandowski” five days later, in which he sought to have Lewandowski deliver a message to Attorney General Sessions instructing him to

curtail the Special Counsel’s investigation. *Id.* If the Special Counsel’s office attempted to compel Trump Jr.’s testimony through a grand jury subpoena shortly before this second meeting, that sequence of events would constitute evidence that when President Trump met with Lewandowski, he intended to curtail the Special Counsel’s investigation in order to protect a member of his family. *Cf.* Mueller Report Vol. II at 178 (“Direct or indirect action by the President to end a criminal investigation into his own or his family members’ conduct to protect against personal embarrassment or legal liability would constitute a core example of corruptly motivated conduct.”).

The Committee further requires access to these materials in order to examine McGahn effectively. With regard to the Trump Campaign’s contacts with agents for the Russian government, the Committee requires these materials to question McGahn about what he knew, whether in his prior capacity as outside counsel to the Trump Campaign or in his later capacity as White House Counsel, and how that knowledge informed his actions as White House Counsel. Securing the withheld information would enable the Committee to formulate questions probing McGahn’s direct recollections; to refresh or challenge that testimony; to corroborate his veracity, which has been challenged by the President;<sup>50</sup> and to seek further leads for the Committee’s overall investigation.

Furthermore, to the extent McGahn had knowledge of President Trump’s potential legal exposure—or that of President Trump’s son—that knowledge would shed light on McGahn’s own awareness of whether the President’s actions constituted obstruction of justice. If McGahn knew

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<sup>50</sup> *See, e.g.*, Donald J. Trump (@realDonaldTrump) (May 11, 2019, 6:39 PM), <https://twitter.com/realdonaldtrump/status/1127342552745762816?l> (“I was NOT going to fire Bob Mueller, and did not fire Bob Mueller. . . . Actually, lawyer Don McGahn had a much better chance of being fired than Mueller. Never a big fan!”).

that the Special Counsel’s investigation placed the President or his family in legal jeopardy, that would further explain the “[s]erious concerns about obstruction” described in his office’s notes. *See id.* Vol. II at 50. The Committee would use any materials shedding light on these subjects in order to question McGahn about his precise understanding of all relevant facts at the time the President engaged in various attempts to undermine the Special Counsel’s investigation, including when he ordered McGahn to fire Special Counsel Mueller.

## **2. The Need for Disclosure Outweighs the Need for Continued Secrecy**

For the reasons just described, the Committee’s need to consider all relevant evidence is “as compelling as any that could be conceived.” *Haldeman* Brief at 16. Courts have frequently authorized limited disclosures of grand jury materials to this Committee where it is investigating allegations of official misconduct, *see supra* pp. 20-21 & nn. 31-32, and the Committee’s need in this case far outweighs any marginal intrusion upon grand jury secrecy posed by the disclosure of the requested materials to a limited number of authorized individuals.

In the present circumstances, a high degree of “continued secrecy” could in fact be maintained because any grand jury materials disclosed to the Committee would remain confidential, absent further action by the Committee, pursuant to the procedures established by Chairman Nadler for safeguarding those materials. *See* Grand Jury Handling Procedures. Any such materials would be stored in a secure location, with access restricted to Committee Members, HPSCI Members, and a limited number of staff; and any release of these materials to other individuals or to the public would be prohibited absent further action by the Committee. *Id.*; *cf. Haldeman*, 370 F. Supp. at 1230 (relevant factors “might well justify even a public disclosure of the [grand jury’s] Report, but are certainly ample basis” for disclosure to the Committee where “[t]he Committee has taken elaborate precautions to insure against unnecessary and inappropriate

disclosure of these materials”).

Additionally, at least some of the matters occurring before the grand jury have already been made public through the voluntary acts of grand jury witnesses. Multiple witnesses have spoken publicly about their grand jury appearances in television interviews or other press appearances, including former Trump Campaign aide Sam Nunberg;<sup>51</sup> author Jerome Corsi;<sup>52</sup> and former Trump Campaign adviser Carter Page.<sup>53</sup> More broadly, the President has commented extensively about the Special Counsel’s underlying investigation, including by denying critical events described in the Mueller Report.<sup>54</sup> *Cf. In re App. to Unseal Dockets Related to the Independent Counsel’s 1998 Investigation of President Clinton (Independent Counsel Dockets)*, 308 F. Supp. 3d 315, 322 (D.D.C. 2018) (“grand jury secrecy is not unyielding when there is no secrecy left to protect” (internal quotations omitted)).

### 3. The Committee’s Request Covers Only Critical Materials

As described above, the Committee has limited its request to only those grand jury materials it needs to materially advance its investigation. The Committee is solely requesting

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<sup>51</sup> See Josh Gerstein & Darren Samuelsohn, *Nunberg Arrives at Mueller Grand Jury*, Politico, Mar. 9, 2018, online at <https://www.politico.com/story/2018/03/09/sam-nunberg-mueller-grand-jury-449274> (Nunberg publicly announced that he would defy a grand jury subpoena from the Special Counsel’s office, then was seen using the public entrance to the courthouse on the date he was required to testify).

<sup>52</sup> See Jeff Pegues, *Jerome Corsi: “They may come in right here and indict me,”* CBS News, Dec. 11, 2018, online at <https://www.cbsnews.com/news/jerome-corsi-they-may-come-in-right-here-and-indict-me/> (discussing grand jury testimony).

<sup>53</sup> See *The Beat with Ari Melber*, MSNBC, Jan. 23, 2019, online at <https://www.youtube.com/watch?v=lxktpv15fjY> (Page, along with Nunberg and Corsi, answers “yes” when asked if he has been “in front of Mueller’s grand jury”).

<sup>54</sup> See *supra* note 50; see also, e.g., George Stephanopoulos, Interview of President Donald J. Trump (June 12, 2019) (stating that McGahn lied to Special Counsel Mueller about the President’s attempt to have Mr. Mueller fired), online at <https://abcnews.go.com/Politics/president-donald-trump-doesnt-matter-white-house-counsel/story?id=63697487>.

information that the Special Counsel deemed sufficiently significant to be included or referenced in the Report itself; any grand jury materials that bear directly on or provide context regarding the President's state of mind; and grand jury materials that describe actions taken by the central witness to the Committee's investigation, Don McGahn. Indeed, the Committee's request is more tailored than the request it made (and that the court granted) during its investigation of Judge Hastings. *Hastings*, 669 F. Supp. at 1074 (Committee requested "*all* the records, transcripts, minutes and exhibits of the grand jury . . . which indicted Judge Hastings") (emphasis added).

## II. THE COURT SHOULD AUTHORIZE DISCLOSURE OF THE REQUESTED MATERIALS PURSUANT TO ITS INHERENT AUTHORITY

In the alternative, the Committee preserves its arguments that this Court is authorized to disclose the requested materials pursuant to its inherent authority, and that it should exercise that discretion in the circumstances here.

In *McKeever*, a panel of the D.C. Circuit concluded that Rule 6(e) restricts the discretion of district courts to disclose grand jury material to the enumerated exceptions contained in Rule 6(e)(3). 920 F.3d at 844-50. The decision in *McKeever* currently forecloses the Committee from prevailing before this Court on this argument. However, the panel in *McKeever* recognized that its decision created a circuit split with respect to the Second, Seventh, and Eleventh Circuits. *See McKeever*, 920 F.3d at 850; *In re Craig*, 131 F.3d 99, 102-03 (2d Cir. 1997); *Carlson v. United States*, 837 F.3d 753, 762-67 (7th Cir. 2016); *Pitch v. United States*, 915 F.3d 704, 707 (11th Cir. 2019).<sup>55</sup> In the event *McKeever* is subject to further review, the Committee respectfully preserves its argument with respect to this Court's inherent authority to authorize disclosure of grand jury

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<sup>55</sup> Subsequent to the issuance of the court's decision in *McKeever*, the Eleventh Circuit ordered rehearing en banc in *Pitch* and vacated the decision of the panel. *See Order, Pitch v. United States*, No. 17-15016 (11th Cir. June 4, 2019).

materials.

Additionally, if *McKeever* is subject to further review such that this Court is able to exercise that inherent authority, the Committee preserves its argument that all relevant factors warrant disclosure of the requested materials to the Committee given the extraordinary circumstances presented in this case. *See generally Independent Counsel Dockets*, 308 F. Supp. 3d at 326 (describing factors typically considered). The party seeking disclosure is a coequal branch of government and requires access to these materials in order to carry out a core constitutional function—an investigation of a sitting President for misconduct while in office. *See Haldeman*, 370 F. Supp. at 1230. The grand jury information sought is limited to the specific materials contained or referenced in the Mueller Report and to those additional underlying materials that would shed light on the President’s state of mind or on the actions taken by the Committee’s most critical witness. Additionally, at least some of these materials have already been made public. *See supra* p. 39. Finally, any impact on grand jury witnesses would be minimal, because the materials disclosed to the Committee would remain confidential pursuant to the rules established by the Committee for safeguarding those materials. *See supra* p. 38.

#### **PRAYER FOR RELIEF**

For the foregoing reasons, the Committee respectfully requests the following relief:

1. An order authorizing the release to the Committee of all portions of the Mueller Report that were redacted pursuant to Rule 6(e);
2. An order authorizing the release to the Committee of any underlying transcripts or exhibits referenced in the portions of the Mueller Report that were redacted pursuant to Rule 6(e); and

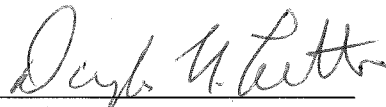
3. An order authorizing release to the Committee of all transcripts of any underlying grand jury testimony and any grand jury exhibits that relate directly to:
  - a. President Trump's knowledge of efforts by Russia to interfere in the 2016 U.S. Presidential election;
  - b. President Trump's knowledge of any direct or indirect links or contacts between individuals associated with his Presidential campaign and Russia, including with respect to Russia's election interference efforts;
  - c. President Trump's knowledge of any potential criminal acts by him or any members of his administration, his campaign, his personal associates, or anyone associated with his administration or campaign; or
  - d. Actions taken by former White House Counsel Donald F. McGahn II during the campaign, the transition, or McGahn's period of service as White House Counsel.

**ORAL ARGUMENT REQUESTED**

The Committee respectfully requests oral argument on this application.



Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Douglas N. Letter", is written over a horizontal line.

Douglas N. Letter (D.C. Bar No. 253492)  
*General Counsel*

OFFICE OF GENERAL COUNSEL  
U.S. HOUSE OF REPRESENTATIVES  
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Douglas.Letter@mail.house.gov

*Counsel for the Committee on the Judiciary of the  
United States House of Representatives*

July 26, 2019

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

IN RE:

APPLICATION OF THE COMMITTEE ON  
THE JUDICIARY, U.S. HOUSE OF  
REPRESENTATIVES, FOR AN ORDER  
AUTHORIZING THE RELEASE OF  
CERTAIN GRAND JURY MATERIALS

Case: 1:19-gj-00048  
Assigned To : Howell, Beryl A.  
Assign. Date : 7/26/2019  
Description: Misc.

**DECLARATION OF PERRY H. APELBAUM**

I, Perry H. Apelbaum, pursuant to the provisions of 28 U.S.C. § 1746, declare and say:

1. I am Chief Counsel and Staff Director for the Committee on the Judiciary of the U.S. House of Representatives (the Committee). I have served in this capacity since January 3, 2019.

2. Attached as Exhibit A is a true and correct copy of a Memorandum from Chairman Jerrold Nadler (Chairman Nadler) issued to Members of the Committee on July 11, 2019, in connection with a July 12, 2019 hearing entitled *Lessons from the Mueller Report, Part III: "Constitutional Processes for Addressing Presidential Misconduct."*

3. Attached as Exhibit B is a true and correct copy of a letter to the Honorable William P. Barr, Attorney General (Attorney General Barr), from Chairman Nadler; Adam Schiff, Chairman, House Permanent Select Committee on Intelligence (Chairman Schiff); Elijah Cummings, Chairman, House Committee on Oversight and Reform (Chairman Cummings); Elliot Engel, Chairman, House Committee on Foreign Affairs (Chairman Engel); Maxine Waters, Chairwoman, House Committee on Financial Services (Chairwoman Waters); and Richard Neal, Chairman, House Committee on Ways and Means (Chairman Neal), dated February 22, 2019.

4. Attached as Exhibit C is a true and correct copy of a letter to Attorney General Barr from Chairman Nadler, Chairman Schiff, Chairman Cummings, Chairman Engel, Chairwoman Waters, and Chairman Neal, dated March 25, 2019.

5. Attached as Exhibit D is a true and correct copy of a letter to Attorney General Barr from Chairman Nadler, Chairman Schiff, Chairman Cummings, Chairman Engel, Chairwoman Waters, and Chairman Neal, dated April 1, 2019.

6. Attached as Exhibit E is a true and correct copy of a letter to Attorney General Barr, Deputy Attorney General Rod Rosenstein, and Director of the Federal Bureau of Investigation Christopher Wray (Director Wray) from Chairman Schiff and Ranking Member Devin Nunes, House Permanent Select Committee on Intelligence (Ranking Member Nunes) provided to me by the House Permanent Select Committee on Intelligence, dated March 27, 2019.

7. Attached as Exhibit F is a true and correct copy of a letter to Attorney General Barr, Deputy Attorney General Rosenstein, and Director Wray from Chairman Schiff and Ranking Member Nunes provided to me by the House Permanent Select Committee on Intelligence, dated April 25, 2019.

8. Attached as Exhibit G is a true and correct copy of a subpoena issued to Attorney General Barr from Chairman Nadler, dated April 19, 2019.

9. Attached as Exhibit H is a true and correct copy of a subpoena issued to Donald F. McGahn, II from Chairman Nadler, dated April 22, 2019.

10. Attached as Exhibit I is a true and correct copy of a letter to Chairman Nadler from Pat Cipollone, Counsel to the President, dated May 20, 2019.

11. Attached as Exhibit J is a true and correct copy of a letter to Chairman Nadler from Pat Cipollone, Counsel to the President, dated June 18, 2019.

12. Attached as Exhibit K is a true and correct copy of a letter to Chairman Nadler from Stephen E. Boyd, Assistant Attorney General, U.S. Department of Justice (AAG Boyd), dated May 1, 2019.

13. Attached as Exhibit L is a true and correct copy of a letter to Attorney General Barr from Chairman Nadler dated May 3, 2019.

14. Attached as Exhibit M is a true and correct copy of a letter to Chairman Nadler from AAG Boyd, dated May 7, 2019.

15. Attached as Exhibit N is a true and correct copy of a letter to Attorney General Barr, Deputy Attorney General Rod Rosenstein, and Director Wray from Chairman Schiff provided to me by the House Permanent Select Committee on Intelligence, dated May 8, 2019.

16. Attached as Exhibit O is a true and correct copy of a letter to Attorney General Barr and to Pat Cipollone, Counsel to the President, from Chairman Nadler, dated May 24, 2019.

17. Attached as Exhibit P is a true and correct copy of a brief filed on behalf of the United States in *In re Report & Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives*, Misc. No. 74-21, 370 F. Supp. 1219 (D.D.C. March 5, 1974), dated March 5, 1974, obtained by Judiciary Committee staff from the website of the National Archives and Records Administration.

18. Attached as Exhibit Q is a true and correct copy of an Order issued by the Special Division of the U.S. Court of Appeals for the D.C. Circuit in *In re Madison Guaranty Savings & Loan Association*, Div. No. 94-1 (D.C. Cir. Spec. Div. July 7, 1998), dated July 7, 1998, as excerpted from Volume II, Tab B of H. Doc. 105-310, *Referral from Independent Counsel Kenneth W. Starr in Conformity with the Requirements of Title 28, United States Code, Section 395(c)* (1998).

19. Attached as Exhibit R is a true and correct copy of a letter to Attorney General Barr from Chairman Nadler, dated April 11, 2019.

20. Attached as Exhibit S is a true and correct copy of a letter to Chairman Nadler from AAG Boyd, dated May 6, 2019.

21. Attached as Exhibit T is a true and correct copy of an excerpt of the unofficial transcript from a Committee hearing conducted on July 12, 2019, entitled *Lessons from the Mueller Report, Part III: "Constitutional Processes for Addressing Presidential Misconduct,"* as initially produced by the House Recording Office on July 12, 2019.

22. Attached as Exhibit U is a true and correct copy of a Memorandum from Chairman Nadler issued to Members of the Committee on June 19, 2019, in connection with a June 20, 2019 hearing entitled *Lessons from the Mueller Report, Part II: Bipartisan Perspectives*.

23. Attached as Exhibit V is a true and correct copy of an excerpt of the unofficial transcript from a Committee hearing conducted on July 24, 2019, entitled *Oversight of the Report on the Investigation Into Russian Interference in the 2016 Presidential Election: Former Special Counsel Robert S. Mueller, III*, as initially produced by the House Recording Office on July 24, 2019.

24. Attached as Exhibit W is a true and correct copy of an excerpt of the unofficial transcript from a hearing conducted by the House Permanent Select Committee on Intelligence on July 24, 2019, entitled *Former Special Counsel Robert S. Mueller, III on the Investigation Into Russian Interference in the 2016 Presidential Election*, as initially produced by the House Recording Office on July 24, 2019.

25. Attached as Exhibit X is a true and correct copy of a Memorandum from Chairman Nadler issued to Members of the Judiciary Committee entitled *Procedures for Handling Grand*

*Jury Information*, dated July 26, 2019.

26. Attached as Exhibit Y is a true and correct copy of a letter to the Honorable John J. Sirica, Chief Judge, U.S. District Court for the District of Columbia, from Peter W. Rodino, Jr., Chairman, House Committee on the Judiciary, dated March 8, 1974, obtained by Judiciary Committee staff from the website of the National Archives and Records Administration.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 26, 2019, in Washington, D.C.



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Perry H. Apfelbaum

# **EXHIBIT A**

**U.S. House of Representatives**  
**Committee on the Judiciary**

Washington, DC 20515-6216

One Hundred Sixteenth Congress

**MEMORANDUM**

**To:** Members of the Committee on the Judiciary  
**From:** Chairman Jerrold Nadler  
**Date:** July 11, 2019  
**Re:** Lessons from the Mueller Report, Part III: "Constitutional Processes for Addressing Presidential Misconduct"

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The Committee on the Judiciary on Friday, July 12, 2019, at 9:00 a.m. in room 2141 of the Rayburn House Office Building will hold a hearing on "Lessons from the Mueller Report, Part III: 'Constitutional Processes for Addressing Presidential Misconduct.'" The Majority witnesses are Caroline Fredrickson, President, American Constitution Society; and Michael Gerhardt, Samuel Ashe Distinguished Professor in Constitutional Law, University of North Carolina School of Law. The Minority witness is Dr. John Eastman, Henry Salvatori Professor of Law and Community Service Director, Center for Constitutional Jurisprudence, Dale E. Fowler School of Law.

**I. Congress' Article I Authorities**

The purpose of this hearing is to examine the range of constitutional remedies for addressing presidential misconduct available to Congress under its Article I powers.

By way of background, the redacted version of the "Report On The Investigation Into Russian Interference In The 2016 Presidential Election" ("Mueller Report" or "the Report") finds that the Russian government attacked the 2016 U.S. presidential election in "sweeping and systematic fashion." The Mueller Report, released on April 18, 2019, also describes multiple instances of possible obstruction of justice by President Donald Trump that were investigated by Special Counsel Robert S. Mueller, III. As the Special Counsel states in the Mueller Report:

[I]f we had confidence after a thorough investigation of the facts that the President clearly did not commit obstruction of justice, we would so state. Based on the facts and the applicable legal standards, however, we are unable to reach that judgment. The evidence we obtained about the President's actions and intent presents difficult issues that prevent us from conclusively determining that no criminal conduct occurred. Accordingly, while this report does not conclude that the President committed a crime, it also does not exonerate him.<sup>1</sup>

The Committee on the Judiciary has a constitutional duty to investigate credible allegations of misconduct by executive branch officials, including the President of the United States. The Mueller

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<sup>1</sup>Mueller Report, Vol. II at 2.



Report explicitly acknowledged Congress's role in investigating and potentially rectifying presidential misconduct. In explaining why the Report did not reach a "traditional prosecution or declination decision" regarding the President's conduct outlined in Volume II, the Special Counsel "recognized that a federal criminal accusation against a sitting President would place burdens on the President's capacity to govern and potentially preempt **constitutional processes for addressing presidential misconduct.**"<sup>2</sup> That passage is the source for tomorrow's hearing title and reflects the Special Counsel's recognition that under our Nation's tripartite system of government each branch acts as a check on the power of the others. As the Mueller Report's frequent references to Congress make clear, Congress has a role in investigating the potential presidential misconduct he uncovered so that it may determine how best to exercise its Article I powers to act as a check on the abuse or misuse of Executive Branch power.

Accordingly, the Committee has sought to obtain the full version of the Mueller Report, in addition to key underlying evidentiary and investigative materials.<sup>3</sup> The Committee has also sought to obtain documents and testimony from former White House Counsel Donald McGahn<sup>4</sup> and others as part of its "investigation into the alleged obstruction of justice, public corruption, and other abuses of power by President Donald Trump, his associates, and members of his Administration and related concerns."<sup>5</sup> The Committee has previously specified that the purpose of this investigation is to independently ascertain the relevant facts in order to determine the appropriate steps to take pursuant to its Article I powers:

The purposes of this investigation include: (1) investigating and exposing any possible malfeasance, abuse of power, corruption, obstruction of justice, or other misconduct on the part of the President or other members of his Administration; (2) considering whether the conduct uncovered may warrant amending or creating new federal authorities, including among other things, relating to election security, campaign finance, misuse of electronic data, and the types of obstructive conduct that the Mueller Report describes; and (3) considering whether any of the conduct described in the Special Counsel's Report warrants the Committee in taking any further steps under Congress' Article I powers. That includes whether to approve articles of impeachment with respect to the President or any other Administration official, as well as the consideration of other steps such as

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<sup>2</sup> Mueller Report, Vol. II at 1 (citing U.S. CONST. Art. I § 2, cl. 5; § 3, cl. 6) (emphasis added).

<sup>3</sup> On April 19, 2019, the Committee issued a subpoena to Attorney General Barr seeking an unredacted copy of the Mueller Report and underlying materials. The Attorney General failed to comply with subpoena. The Committee voted to hold him in contempt on May 8, 2019. The specific factual circumstances surrounding the Barr subpoena are described in House Report 116-105, which was filed by the Judiciary Committee on June 6, 2019. On June 10, 2019, the Department of Justice agreed to begin complying with this subpoena by setting up a process by which all Members of the Committee are permitted to review key underlying documents referenced in the Mueller Report and to review a less-redacted version of Volume II of the Mueller Report, excluding grand jury information. The Department's production of underlying documents remains ongoing, and enforcement of the subpoena therefore remains pending. The Committee's effort to obtain these materials is consistent with the views expressed by the House in H. Con. Res. 24, which passed the House unanimously and called for "the full release to Congress of any report, including findings, Special Counsel Mueller provides to the Attorney General."

<sup>4</sup> The Mueller Report revealed that Mr. McGahn was a witness to multiple instances of potential obstruction of justice. As such, on April 22, 2019, Chairman Nadler issued a subpoena for testimony and documents from Mr. McGahn. The subpoena requested that Mr. McGahn produce documents shared with him or his counsel by the White House during the Special Counsel's investigation by May 7, 2019 and appear to testify before the Committee on May 21, 2019. On May 21, 2019 the Judiciary Committee held its scheduled hearing and Mr. McGahn did not appear. More specific details surrounding the McGahn subpoena are set forth in the relevant section of House Report 116-108.

<sup>5</sup> H. Rep. No. 116-105, at 13 (2019).

censure or issuing criminal, civil or administrative referrals. No determination has been made as to such further actions, and the Committee needs to review the unredacted report, the underlying evidence, and associated documents so that it can ascertain the facts and consider its next steps.<sup>6</sup>

H. Res. 430, authorizing the Committee on the Judiciary to initiate or intervene in judicial proceedings to enforce certain subpoenas and for other purposes, as passed by the House on June 11, 2019 affirmed “[t]hat in connection with any judicial proceeding brought under the first or second resolving clauses, the chair of any standing or permanent select committee exercising authority thereunder has any and all necessary authority under Article I of the Constitution.”<sup>7</sup>

As described above, this Committee is currently investigating allegations of presidential misconduct described in the Mueller Report and other potential abuses of power. With regard to the Committee’s responsibility to determine whether to recommend articles of impeachment against the President, articles of impeachment have already been introduced in this Congress and referred to the Judiciary Committee.<sup>8</sup> They are under consideration as part of the Committee’s investigation, although no final determination has been made. In addition, the Committee has the authority to recommend its own articles of impeachment for consideration by the full House of Representatives. The Committee seeks key documentary evidence and intends to conduct hearings with Mr. McGahn and other critical witnesses testifying to determine whether the Committee should recommend articles of impeachment against the President or any other Article I remedies, and if so, in what form. With respect to the grand jury information included in the Mueller Report, because the Committee has not been provided access to any grand jury materials, H. Res. 430 also authorized the Committee to petition the federal court to provide it with access to that information.<sup>9</sup> As such, the hearing discussion may cover the question of how to best safeguard any grand jury materials the Committee receives.

While censure of the President is rare, Congress has previously passed measures expressing disagreement with specific presidential conduct.<sup>10</sup> Examples include an 1834 Senate resolution repudiating President Andrew Jackson for removing his Treasury Secretary because of his refusal to withdraw government deposits from the Bank of the United States, and an 1842 House committee report criticizing President John Tyler’s use of the veto, accusing him of a “gross abuse of constitutional power.”<sup>11</sup> There is also precedent for a more formal version of censure, in which a house of Congress adopts a resolution not only stating its disagreement with presidential conduct, but also announcing that it finds the conduct worthy of an explicit and official reprimand.<sup>12</sup> In 1860, for example, the House

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<sup>6</sup> *Id.*

<sup>7</sup> As explained in House Report 116-108 accompanying H. Res. 430, “this clause confirms that each committee has the full authority of the House of Representatives to enforce its subpoenas” and that “Committees may, in connection with exercising their authority under this resolved clause, choose to specify the precise constitutional powers upon which they are relying, as well as the legitimate legislative purposes and details of their work within the full bounds of their authority under Article I, whether at or in connection with hearings, in Committee reports, memoranda, or through other means.”

<sup>8</sup> H. Res. 13, 116th Cong. (2019).

<sup>9</sup> H. Res. 430, 116th Cong. (2019).

<sup>10</sup> Todd Garvey, *The Constitutionality of Censuring the President*, CRS Legal Side Bar LSB10096, at 2 (Mar. 12, 2018) (referred to as CRS Legal Side Bar LSB10096).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

adopted a resolution stating that President James Buchanan deserved the “reproof of this House” for awarding federal contracts to party loyalists.<sup>13</sup>

With regard to a possible criminal, civil, or administrative referral, the Department of Justice has discretion as to whether to act upon a referral by Congress for prosecution or civil enforcement. Moreover, with regard to presidential misconduct, the Department’s policy prohibiting the prosecution of a sitting president is an obstacle to DOJ holding him or her accountable for misconduct while in office.<sup>14</sup> State authorities may be more willing to consider enforcing state laws against a president to the extent they deem appropriate under applicable law. Nonetheless, the President is not immune from criminal prosecution after leaving office, and the Supreme Court has already held that a sitting President may be sued in his or her personal capacity for conduct that occurred before taking office.<sup>15</sup> Thus, the congressional referral process serves the important purpose of creating a record and preserving and referring evidence for such time as prosecution, civil enforcement, or other administrative response is feasible.

In addition to these Article I authorities, the hearing is also expected to consider a range of legislative responses to allegations of presidential misconduct, including the operation of the special counsel regulations, and the Administration’s efforts to use expansive theories of absolute immunity, executive privilege, and other legal theories to block and limit congressional investigations. These matters raise important constitutional questions.

## **II. Possible Legislative Remedies Related to Presidential Misconduct**

The following is a non-exclusive list of possible legislative responses that fall within the Judiciary Committee’s jurisdiction.

### **A. Transparency With Regard to White House/DOJ Communications Concerning Law Enforcement Investigations**

As described in Volume II of the Mueller Report, President Trump repeatedly attempted to curtail or impede the Special Counsel’s investigation. According to the Report, among other things, President Trump requested then-Attorney General Jeff Sessions to reverse his recusal from the Special Counsel investigation with an eye toward curtailing its scope.<sup>16</sup> Once President Trump learned that he was under investigation for potential obstruction of justice, President Trump ordered White House Counsel Don McGahn to have Special Counsel Mueller removed altogether.<sup>17</sup>

<sup>13</sup> *Id.*

<sup>14</sup> See *A Sitting President’s Amenability to Indictment and Criminal Prosecution*, 24 Op. O.L.C. 222 (2000) (“2000 OLC Memo”).

<sup>15</sup> *Clinton v. Jones*, 520 U.S. 681 (1997).

<sup>16</sup> Mueller Report, Vol II at 5.

<sup>17</sup> *Id.* Vol. II at 4. In an exchange with Senator Kamala Harris (D-CA) at a May 1, 2019 hearing, Attorney General Barr struggled to answer whether “the President or anyone at the White House ever asked or suggested” that he “open an investigation of anyone,” stating “I’m, I’m trying to grapple with the word ‘suggest.’ I mean, there have been discussions of, of matters out there that, uh—they have not asked me to open an investigation, but...” *The Department of Justice’s Investigation of Russian Interference with the 2016 Presidential Election: hearing before the S. Comm. on the Judiciary*, 116<sup>th</sup> Cong. (2019). Additionally, at a February 8, 2019 hearing before this Committee, Acting Attorney General Matthew Whitaker would not explicitly deny that he had any contacts with the President or the White House regarding ongoing Trump-related investigations in the Southern District of New York in response to direct questions posed by numerous

A number of legislative proposals would address this type of interference in law enforcement investigations. H.R. 3380, the “Security from Political Interference in Justice Act,” introduced by Rep. Hakeem Jeffries (D-NY), would serve to deter further White House interference in law enforcement investigations through the imposition of transparency and recordkeeping requirements on the White House and the Justice Department related to certain communications between the two. The legislation would require the White House and the Department of Justice to log certain covered communications between their personnel relating to criminal and civil investigations, and to periodically share those logs with Congress, along with the Department’s Inspector General and Office of Professional Responsibility. Additionally, the head of each of these investigative offices would be required to notify Congress if after reviewing the logs they determine that a covered communication is inappropriate from a law enforcement perspective or raises concerns about improper political interference.

### **B. Special Counsel Reform Legislation; Tolling of Statutes of Limitation**

Various bills have been introduced that would impose additional safeguards designed to protect the integrity and independence of future special counsel investigations. Although, existing regulations governing the appointment and removal of a special counsel already provide some limitations on his or her removal, the Attorney General may ultimately rescind or modify these protections against unwarranted removal. H.R. 197, the “Special Counsel Independence and Integrity Act,” introduced by Chairman Nadler (D-NY), would codify those protections by statute and would permit a special counsel who believes his or her removal was unlawful to contest that removal in court. Senator Lindsey Graham (R-SC), Chairman of the Senate Committee on the Judiciary, has proposed similar legislation that would also codify other aspects of existing special counsel regulations.<sup>18</sup> Another related bill, H.R. 47, the “TRUMP Special Counsel Act,” introduced by Rep. Sheila Jackson Lee (D-TX), would also impose additional safeguards.

Attorney General Barr’s oversight of the Special Counsel’s investigation and his handling of the Mueller Report’s release have also raised several additional policy concerns. Under current Department of Justice regulations, the Attorney General is not required to release the report of a special counsel to Congress or the public. While Attorney General Barr eventually publicly released a redacted version of the Report, he published a letter purportedly summarizing the Report’s chief conclusions prior to its release. Additionally, immediately before he released the Report to the public and Congress, Attorney General Barr held a press conference at which he publicly characterized the Special Counsel’s findings. Furthermore, Attorney General Barr initially only provided a redacted version of the Report to Congress. While the Committee eventually negotiated greater Member access to a less redacted version of Volume II of the Report, those efforts entailed months of negotiations and the threat of a criminal contempt referral. To date, no Member of Congress has seen the full unredacted Report.

To address these transparency concerns, Rep. Lloyd Doggett (D-TX) introduced H.R. 1356, the “Special Counsel Transparency Act,” which requires a Special Counsel’s report to be given directly to the Chair and Ranking Member of the House and Senate Judiciary Committees, while being made

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Members of the Committee. See, e.g., Aaron Blake, *Matthew Whitaker’s testimony about Trump trying to influence the Cohen inquiry was cagey. Now we might know why*, WASH. POST, Feb. 20, 2019; Mark Mazzetti et al., *Intimidation, Pressure and Humiliation: Inside Trump’s Two-Year War on the Investigations Encircling Him*, N.Y. TIMES, Feb. 19, 2019.

<sup>18</sup> S. 71, the “Special Counsel Independence and Integrity Act,” 116<sup>th</sup> Cong. (2019).



available to the public in a manner consistent with the Freedom of Information Act. H.R. 1357, the “Special Counsel Reporting Act,” also introduced by Rep. Doggett, would additionally require the Special Counsel to update certain Members of Congress during the course of an investigation, among other congressional reporting requirements.

In addition, Attorney General Barr’s decision declining to charge the President has raised important public policy issues. The Department of Justice’s Office of Legal Counsel (OLC) has concluded that a sitting President cannot be indicted or prosecuted.<sup>19</sup> In his May 24, 2019 letter summarizing the principal conclusions of the Special Counsel’s report, Attorney General Barr wrote “that the evidence developed during the Special Counsel’s investigation is not sufficient to establish that the President committed an obstruction-of-justice offense,” and that this “determination was made without regard to, and is not based on, the constitutional considerations that surround the indictment and criminal prosecution of a sitting president.” The decision by Attorney General Barr, a political appointee of the President, to nonetheless make an express declination determination favoring the President raises significant policy issues. Moreover, the Special Counsel raised those very “constitutional considerations” in the Report to explain why he had declined to make a traditional prosecutorial judgment. There, he noted that Department policy forbids the prosecution of a sitting president and that “[f]airness concerns counseled against potentially reaching that judgment when no charges can be brought.”<sup>20</sup>

The circumstances created by this policy also raise significant questions regarding Congress’s ability under Article I to enact legislation to create accountability for presidential misconduct, as a president may be technically criminally liable for conduct in office yet remain effectively above the law. While potential legislation directly negating the policy raises potential constitutional concerns, there is little debate that the President may be prosecuted after leaving office. As such, Chairman Nadler has introduced H.R. 2678, the “No President is Above the Law Act,” which would toll the statute of limitations on any offense committed by a president, whether before or during his or her term of office, to ensure that he or she is ultimately held accountable for any criminal wrongdoing.

### C. Pardon Legislation

As part of the investigation into potential obstruction of justice, the Special Counsel also examined the President’s conduct toward witnesses such as Paul Manafort and Michael Cohen. Volume II of the Mueller Report noted that the “President’s acts directed at witnesses” included “discouragement of cooperation with the government and suggestions of possible pardons,” many of which took place in plain view.<sup>21</sup> Additionally, in June 2018, in the midst of the Special Counsel investigation, President Trump implied that he may pardon himself in relation to the investigation, tweeting “As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong? In the meantime, the never ending Witch Hunt, led by 13 very Angry and Conflicted Democrats (& others) . . . .”<sup>22</sup>

<sup>19</sup> 2000 OLC Memo; *see also* Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* (Sept. 24, 1973).

<sup>20</sup> Mueller Report, Vol. I at 2.

<sup>21</sup> Mueller Report, Vol. II at 5-6.

<sup>22</sup> Caroline Kenny, *Trump: ‘I have the absolute right to pardon myself’*, CNN (Jun. 4, 2018) available at <https://www.cnn.com/2018/06/04/politics/donald-trump-pardon-tweet/index.html>.

Several Members of Congress have introduced legislation either proposing an amendment to the Constitution to limit the scope of executive clemency or to increase transparency regarding presidential pardons. Rep. Steve Cohen (D-TN) has introduced a proposed amendment to the Constitution that would prohibit the President from granting clemency to him or herself, certain specified close family members, or “to any current or former member of the President’s administration, or to anyone who worked on the President’s presidential campaign as a paid employee.”<sup>23</sup> Rep. Al Green (D-TX) has introduced a similar proposed amendment that would only prohibit the President from granting clemency to him or herself.<sup>24</sup> Rep. Adam Schiff (D-CA) has introduced legislation to require the Department of Justice within 30 days after a pardon to produce to the appropriate Congressional committees all investigative materials related to an offense that arises from an investigation involving the President or a President’s relative for whom a pardon is granted.<sup>25</sup> Rep. Raja Krishnamoorthi (D-IL) has introduced legislation to require the Attorney General within three days of a presidential reprieve or pardon to publish in the Federal Register and on the official website of the President the name of the person, the date on which the reprieve or pardon issued, and the full text of the reprieve or pardon.<sup>26</sup>

#### **D. Foreign Contacts**

Volume I of the Mueller Report, which begins by describing the Russian government’s extensive attacks against the integrity of the 2016 presidential election, also describes certain conduct by the Trump Campaign and individuals associated with the Campaign that could constitute evidence of potential coordination between the Trump Campaign and the Russian government. The Mueller Report documents numerous Russian contacts, which “consisted of business connections, offers of assistance to the Campaign, invitations for candidate Trump and Putin to meet in person, invitations for Campaign officials and representatives of the Russian government to meet, and policy positions seeking improved U.S.-Russian relations.”<sup>27</sup>

The Trump Campaign’s conduct during the 2016 presidential election therefore presents significant concerns regarding the influence of foreign governments over candidates for federal office. As such, several Members of Congress have introduced legislation that would require campaigns to report their contacts with foreign governments. Rep. Eric Swalwell (D-CA) has introduced legislation that would impose on political committees, their agents, or the committee of a candidate for federal office an affirmative duty: 1) to report to the Federal Election Commission any offers of prohibited contributions, donations, expenditures, or disbursements may by a foreign national; and 2) to disclose the identity and purpose of any meeting with a foreign government or agent of a foreign power, with

<sup>23</sup> H.J. Res. 8, 116th Cong. (2019).

<sup>24</sup> H.J. Res. 13, 116th Cong. (2019).

<sup>25</sup> H.R. 1627, 116th Cong. (2019).

<sup>26</sup> H.R. 1348, 116th Cong. (2019).

<sup>27</sup> Mueller Report, Vol. 1 at 5. During a recent interview, in response to a question on whether his campaign would accept information damaging to his opponent from foreign governments or report such an offer to the FBI, President Trump said, “I think maybe you do both.” He went on to say, “It’s not an interference, they have information -- I think I’d take it... If I thought there was something wrong, I’d go maybe to the FBI -- if I thought there was something wrong. But when somebody comes up with oppo research, right, they come up with oppo research, ‘oh let’s call the FBI.’ The FBI doesn’t have enough agents to take care of it. When you go and talk, honestly, to congressman, they all do it, they always have, and that’s the way it is. It’s called oppo research.” ABC News’ Oval Office interview with President Trump, Jun. 13, 2019 *available at* <https://abcnews.go.com/Politics/abc-news-oval-office-interview-president-donald-trump/story?id=63688943>.

failure to comply with these reporting resulting in criminal penalties.<sup>28</sup> Rep. Sheila Jackson Lee (R-TX) has introduced a similar bill, H.R. 2353, the “Duty to Refuse and Report Foreign Interference in American Elections Act of 2019.” Senator Mark Warner (D-VA) has also introduced S.1562, the “Foreign Influence Reporting in Elections Act.”

### **E. Subpoena Enforcement**

The Trump Administration’s refusal to comply with many Congressional subpoenas also raises constitutional concerns. In the 115th Congress, the Committee considered H.R. 4010, the “Congressional Subpoena Compliance and Enforcement Act of 2017,” introduced by Rep. Darrell Issa (R-CA).<sup>29</sup> This legislation provided expedited procedures for Congress to enforce a subpoena in court and would impose monetary penalties on the head of an agency that refused to comply with a subpoena. The Judiciary Committee reported H.R. 4010 unanimously, and it passed by voice vote on the House floor. Representative Madeleine Dean (D-PA) plans to reintroduce the legislation in the 116<sup>th</sup> Congress.

## **III. Additional Legal and Constitutional Issues Presented**

### **A. Presidential Immunity from Prosecution**

The Special Counsel specifically cited the OLC opinion about whether a sitting President can be prosecuted as one of the principal grounds for his decision not to reach a traditional prosecutorial judgment regarding President Trump’s conduct outlined in Volume II of the Report. As noted previously, this policy gives rise to significant concerns about whether the President is effectively placed above the law while in office. Because OLC’s opinion is based on constitutional considerations, it also gives rise to significant concerns about Congress’s own Article I abilities to enact legislation ensuring accountability for presidential misconduct.

In 1973, OLC issued a memorandum concluding that a sitting President cannot be indicted or prosecuted while in office.<sup>30</sup> OLC’s 1973 opinion acknowledged that no explicit textual provision of the Constitution precludes the prosecution of the President. OLC also considered but did not ultimately accept the argument that the President’s position as head of the executive branch precludes him or her from being prosecuted by officers who are, as a structural matter, the President’s subordinates. Instead, OLC based its reasoning on the notion that facing criminal charges would “unduly interfere in a direct or formal sense with the conduct of the Presidency.”<sup>31</sup> OLC assessed that having to face a criminal trial and possible prison sentence would essentially incapacitate the President, making it impossible to perform essential constitutional functions. It also noted that “under our constitutional plan as outlined in Article I, sec. 3, only the Congress by the formal process of impeachment, and not a court by any process should be accorded the power to interrupt the Presidency or oust an incumbent.”<sup>32</sup>

<sup>28</sup> H.R. 2424, 116th Cong. (2019).

<sup>29</sup> H.R. 4010, 115th Cong. (2017).

<sup>30</sup> Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* (Sept. 24, 1973).

<sup>31</sup> *Id.* at 27.

<sup>32</sup> *Id.* at 28.

In 2000, OLC reaffirmed its analysis and its conclusion.<sup>33</sup> Its lengthy opinion first described the 1973 opinion in detail, followed by a description of a brief filed by then-Solicitor General Robert Bork (also in 1973) arguing that then-Vice President Spiro Agnew was amenable to prosecution while in office. That brief, consistent with the 1973 OLC opinion, argued that only the President was immune from prosecution while in office.<sup>34</sup> Next, OLC assessed whether any intervening case law warranted changing its conclusions, and it determined that three relevant decisions were “largely consistent” with its prior analysis.<sup>35</sup>

OLC examined three Supreme Court decisions: (1) *United States v. Nixon*,<sup>36</sup> in which the Court recognized the existence of executive privilege but held that the privilege was not absolute and affirmed a judgment ordering President Nixon to turn over various tape recordings to Special Prosecutor Jaworski; (2) *Nixon v. Fitzgerald*,<sup>37</sup> in which the Court held that the President is absolutely immune from civil damages suits based upon his official acts while in office; and (3) *Clinton v. Jones*,<sup>38</sup> in which the Court held that the President can be sued for civil damages while in office over claims based on his personal conduct before he became President. OLC described all three cases as having “balance[d] the constitutional interests underlying a claim of presidential immunity against the governmental interests in rejecting that immunity.”<sup>39</sup> In OLC’s view, the same balancing analysis supports a conclusion that a President cannot be indicted or prosecuted while in office because of the unique burdens that such proceedings—and, potentially, an actual sentence of imprisonment—would impose.<sup>40</sup>

OLC acknowledged the “important national interest in ensuring that no person—including the President—is above the law.”<sup>41</sup> It also acknowledged the importance of avoiding the possibility that the statute of limitations could run out by the time the President leaves office.<sup>42</sup> However, it noted that “a President suspected of the most serious criminal wrongdoing might well face impeachment and removal from office before his term expired, permitting criminal prosecution at that point.”<sup>43</sup> Additionally, it noted that the statute of limitations could be tolled by a court—or that Congress “could overcome any such obstacle by imposing its own tolling rule.”<sup>44</sup> As to the argument that impeachment itself might pose the same or similar types of burdens on the President’s exercise of his or her constitutional duties, OLC stated that this risk is “expressly contemplated by the Constitution,” and that “the Framers themselves specifically determined that the public interest in immediately removing a sitting President whose continuation in office poses a threat to the Nation’s welfare outweighs the public interest in avoiding the Executive burdens incident thereto.”<sup>45</sup>

Some scholars have criticized OLC’s analysis and conclusions. Professor Laurence Tribe, for example, has argued that it is untenable that a President could commit a crime in order to win an election, escape accountability while in office, and then benefit from a pardon from a hand-picked Vice

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<sup>33</sup> 2000 OLC Memo.

<sup>34</sup> *See id.* at 232-36.

<sup>35</sup> *Id.* at 238.

<sup>36</sup> 418 U.S. 683 (1974).

<sup>37</sup> 457 U.S. 731 (1982).

<sup>38</sup> 520 U.S. 681 (1997).

<sup>39</sup> 2000 OLC Memo at 244.

<sup>40</sup> *Id.* at 246-58.

<sup>41</sup> *Id.* at 255.

<sup>42</sup> *Id.* at 256.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 258.



President upon the President's resignation or impeachment.<sup>46</sup> Walter Dellinger, who served as the Assistant Attorney General in charge of OLC from 1993 to 1996, has argued that the President could potentially be *indicted* while in office even if not prosecuted.<sup>47</sup> Nonetheless, Special Counsel Mueller stated that his office accepted OLC's conclusions for purposes of their investigation.<sup>48</sup>

OLC opinions are generally considered to be binding upon the executive branch. On rare occasions, OLC has rescinded prior opinions if it later determines their reasoning to be fundamentally unsound. This occurred, for example, with respect to several opinions authored by former Deputy Assistant Attorney General John Yoo regarding the treatment of detainees, the Foreign Intelligence Surveillance Act, and other national security matters.<sup>49</sup> The Attorney General also has the authority to override OLC, and he or she could conceivably rescind prior OLC opinions. The President, as chief executive, could also conceivably instruct the Attorney General to take such actions, although it is unclear whether any President has done so previously.

## **B. White House Officials' Purported "Absolute Immunity" from Compelled Testimony and Excessive use of Executive Privilege**

### **1. Absolute Immunity**

In several recent instances, the Trump administration has asserted that various former White House officials are "absolutely immune" from having to comply with congressional subpoenas for testimony. On this basis, President Trump instructed former White House Counsel Don McGahn not to appear before this Committee in response to its subpoena. He also instructed former White House Communications Director Hope Hicks not to answer any questions in a transcribed interview that related to her service in the White House. Additionally, the Trump administration has indicated that the President may assert "absolute immunity" with respect to White House adviser Kellyanne Conway in response to a subpoena from the Committee on Oversight and Reform.<sup>50</sup>

On May 20, 2019, OLC issued an opinion (the "Engel Memorandum") supporting this position with respect to Mr. McGahn.<sup>51</sup> The Engel Memorandum correctly notes that administrations of both parties have claimed that White House officials are "absolutely immune" from having to provide compelled testimony before Congress. One well-known instance occurred when President George W. Bush took this position with respect to former White House Counsel Harriet Miers, who was subpoenaed by this Committee in the course of its investigation into the firings of several U.S. Attorneys. President Obama also took this position with respect to then-White House adviser David Simas, who was subpoenaed by the Committee on Oversight and Government Reform in the course of an investigation into possible Hatch Act violations.<sup>52</sup> The basis for such a claim was first described in a

<sup>46</sup> Laurence H. Tribe, *Constitution Rules Out Immunity for Sitting Presidents*, BOSTON GLOBE, Dec. 12, 2018.

<sup>47</sup> Walter Dellinger, *Indicting a Sitting President Is Not Foreclosed: The Complex History*, Lawfare Blog, June 18, 2018.

<sup>48</sup> Special Counsel Robert S. Mueller, III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, Vol. II at 3 (March 2019).

<sup>49</sup> See Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Memorandum *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001* (Jan. 15, 2009).

<sup>50</sup> See Letter to Elijah E. Cummings, Chair, H. Comm. on Oversight & Reform, from Pat A. Cipollone, Counsel to the President (June 24, 2019) (stating that Ms. Conway would decline a voluntary invitation for testimony. In response, the committee voted to authorize a subpoena.).

<sup>51</sup> Memorandum from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, *Re: Testimonial Immunity Before Congress of the Former Counsel to the President* (May 20, 2019) ("Engel Memorandum").

<sup>52</sup> See *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. \_\_ (July 15, 2014).

1971 memorandum written by William Rehnquist, who was then serving as the Assistant Attorney General in charge of OLC.<sup>53</sup>

The Engel Memorandum principally argues that requiring senior White House officials to testify before Congress would interfere in various ways with the separation of powers. It asserts that this would create an opportunity for Congress to try to “supervise the President’s actions,” because senior White House aides essentially serve as the President’s “alter egos.”<sup>54</sup> It also claims that having to testify in front of Congress could divert senior White House aides from their primary responsibilities to the President. Additionally, OLC claims that such compelled testimony would create an inherent risk of disclosing privileged material, notwithstanding the witness’s ability to assert privilege on a question-by-question basis.<sup>55</sup>

However, the only court ever to consider these arguments has decisively rejected them. When this Committee sued to compel Ms. Miers’s testimony, the U.S. District Court for the District of Columbia, in an opinion issued by Judge Bates, held that the “absolute immunity” doctrine had no basis in any case law.<sup>56</sup> To the contrary, Judge Bates pointed out that in the most closely analogous case, *Harlow v. Fitzgerald*,<sup>57</sup> the Supreme Court had concluded that senior White House aides are not absolutely immune from civil damages suits.<sup>58</sup> In doing so, the Court had rejected the idea that such advisers serve as “alter egos” to the President—a central underpinning of OLC’s rationale for absolute immunity from compelled testimony. Judge Bates concluded that the rationales for excusing White House aides from congressional testimony are in fact weaker than those for excusing them from civil damages suits, noting that other senior administration officials, such as Cabinet officials in charge of various departments and agencies, testify before Congress on a regular basis.<sup>59</sup>

The Engel Memorandum also states that the administration’s position is “the same answer that the Department of Justice has repeatedly provided for nearly five decades.”<sup>60</sup> However, although the Department has maintained a position that senior White House aides are immune from compelled testimony, the record of the White House permitting senior aides to testify before Congress—whether on a voluntary basis or through some other accommodation reached with the relevant congressional committee—is decidedly more mixed. The Congressional Research Service, for example, has catalogued dozens of instances in recent decades in which senior White House aides have testified before various committees.<sup>61</sup> Thus, although the Department and OLC have maintained their position as a theoretical matter that a White House aide cannot be forced to testify over the President’s objections, as a practical matter such objections have often been reserved or withdrawn in the face of congressional subpoenas or other pressures.

## 2. Executive Privilege

<sup>53</sup> See Engel Memorandum at 2.

<sup>54</sup> *Id.* at 5; see *id.* at 13.

<sup>55</sup> *Id.* at 5-6.

<sup>56</sup> *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

<sup>57</sup> 457 U.S. 800 (1982).

<sup>58</sup> *Miers*, 558 F. Supp. at 100-01.

<sup>59</sup> *Id.* at 101.

<sup>60</sup> Engel Memorandum at 1.

<sup>61</sup> See Harold C. Relyea & Todd B. Tatelman, *Presidential Advisers’ Testimony Before Congressional Committees: An Oversight*, Congressional Research Service, Apr. 10, 2007.

In addition to asserting dubious claims of “absolute immunity” as to certain witnesses, the White House has instructed several witnesses—including Mr. McGahn, Ms. Hicks, and former White House attorney Annie Donaldson—not to comply with the Committee’s duly issued subpoenas for documents or (in Ms. Donaldson’s case) written answers to questions on the basis that the documents and answers would “implicate constitutionally-based Executive Branch confidentiality interests.”<sup>62</sup> The White House’s legal assertions are untenable for several reasons. To begin, in the face of a congressional subpoena, the President must actually assert a claim of executive privilege with respect to any portion of a witness’s testimony or specific documents. The bare assertion that a witness’s response to a question a document might *implicate* “confidentiality interests” does not absolve the subpoenaed party of his or her duty to comply. To the contrary, the law is clear that a witness is “not excused from compliance with the Committee’s subpoena by virtue of a claim of executive privilege that may ultimately be made.”<sup>63</sup> Nor can a “blanket assertion of privilege” over a broad set of records suffice, without a “showing . . . that any of the individual records satisf[ies] the prerequisites for the application of the privilege.”<sup>64</sup>

Moreover, the White House has no valid basis to assert executive privilege with respect to matters specifically described in the Mueller Report. The White House long ago made the strategic decision to not invoke executive privilege with respect to numerous witnesses’ interviews with the Special Counsel’s office, and then to the publication of the Report. The Mueller Report in fact includes numerous passages describing statements made by the witnesses in their interviews and citing to specific reports of those interviews. Often, the Report contains verbatim quotations of statements that witnesses made to the Special Counsel’s office. The Report also describes and quotes from certain documents voluntarily provided to the Special Counsel’s office, such as handwritten notes taken by Ms. Donaldson and others. The D.C. Circuit has expressly held that the White House “waive[s] its claims of privilege in regard to [] specific documents that it voluntarily reveal[s] to third parties outside the White House.”<sup>65</sup> The court has also made clear that the release of a particular document “waives [] privileges for the document or information specifically released.”<sup>66</sup> In that case, the White House had voluntarily disclosed a document to the private attorney for a former cabinet official.<sup>67</sup> Here, the White House has voluntarily authorized the release of the redacted Mueller Report to the public at large and has also shared numerous documents with private counsel for various witnesses. As a result, any executive privilege claims related to matters described in the Mueller Report or in documents shared with third parties has clearly been waived. Nevertheless, the White House has improperly prevented several witnesses from answering questions regarding that same information.

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<sup>62</sup> See Letter to Jerrold Nadler, Chairman, H. Comm. on the Judiciary, from Sandra L. Moser, Quinn Emanuel, Jul. 5, 2019 (enclosing Annie Donaldson’s written answers to Committee’s interrogatories, and stating that the White House has objected on a question-by-question basis); See also Letter to Jerrold Nadler, Chairman, H. Comm. on the Judiciary, from Pat Cipollone, Counsel to the President, May 7, 2019 (directing Don McGahn not to comply with subpoena for documents on the grounds that “[t]he White House records remain legally protected from disclosure under longstanding constitutional principles, because they implicate significant Executive Branch confidentiality interests and executive privilege”).

<sup>63</sup> *Comm. on the Judiciary, U.S. House of Reps. v. Miers*, 558 F. Supp. 2d 53, 106 (D.D.C. 2008).

<sup>64</sup> *Comm. on Oversight & Gov’t Reform, U.S. House of Reps. v. Lynch*, 156 F. Supp. 3d 101, 104 (D.D.C. 2016).

<sup>65</sup> *In re Sealed Case*, 121 F.3d 729, 741-42 (D.C. Cir. 1997).

<sup>66</sup> *Id.* at 741.

<sup>67</sup> See *id.* at 740.

# **EXHIBIT B**

**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515**

February 22, 2019

The Honorable William P. Barr  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Mr. Attorney General:

Recent reports suggest that Special Counsel Robert Mueller may be nearing the end of his investigation into “any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump” and other matters that may have arisen directly from the investigation.<sup>1</sup> As you know, Department of Justice regulations require that, “[a]t the conclusion of the Special Counsel’s work, he or she shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel.”<sup>2</sup>

After nearly two years of investigation—accompanied by two years of direct attacks on the integrity of the investigation by the President—the public is entitled to know what the Special Counsel has found. We write to you to express, in the strongest possible terms, our expectation that the Department of Justice will release to the public the report Special Counsel Mueller submits to you—without delay and to the maximum extent permitted by law.

There also remains a significant public interest in the full disclosure of information learned by the Special Counsel about the nature and scope of the Russian government’s efforts to undermine our democracy. To the extent that the Department believes that certain aspects of the report are not suitable for immediate public release, we ask that you provide that information to Congress, along with your reasoning for withholding the information from the public, in order for us to judge the appropriateness of any redactions for ourselves.

We also expect that the Department will provide to our Committees, upon request and consistent with applicable law, other information and material obtained or produced by the

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<sup>1</sup> *Appointment of Special Counsel to Investigate Russian interference with the 2016 Presidential Election and Related Matters*, Order No. 3915-2017, Office of the Deputy Attorney General, May 17, 2017.

<sup>2</sup> 26 C.F.R. § 600.8(c).



Special Counsel regarding certain foreign actors and other individuals who may have been the subject of a criminal or counterintelligence investigation. This expectation is well-grounded in the precedent set by the Department in recent years. In other closed and pending high-profile cases alleging wrongdoing by public officials, both the Department and the FBI have produced substantial amounts of investigative material, including classified and law enforcement sensitive information, to the House of Representatives.

Finally, although we recognize the policy of the Department to remain sensitive to the privacy and reputation interests of individuals who will not face criminal charges,<sup>3</sup> we feel that it is necessary to address the particular danger of withholding evidence of misconduct by President Trump from the relevant committees.

If the Special Counsel has reason to believe that the President has engaged in criminal or other serious misconduct, then the President must be subject to accountability either in a court or to the Congress. But because the Department has taken the position that a sitting President is immune from indictment and prosecution,<sup>4</sup> Congress could be the only institution currently situated to act on evidence of the President's misconduct. To maintain that a sitting president cannot be indicted, and then to withhold evidence of wrongdoing from Congress because the President will not be charged, is to convert Department policy into the means for a cover-up. The President is not above the law.

Thank you for your consideration.

Sincerely,



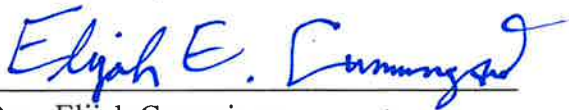
Rep. Jerrold Nadler  
Chairman

House Committee on the Judiciary



Rep. Adam Schiff  
Chairman

House Permanent Select Committee on  
Intelligence



Rep. Elijah Cummings  
Chairman

House Committee on Oversight and Reform



Rep. Eliot Engel  
Chairman

House Foreign Affairs Committee

<sup>3</sup> See, e.g., *United States Attorneys' Manual* 9-27.790 and 9-11.130.

<sup>4</sup> See Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel; *Amenability of the President, Vice President, and Other Civil Officers to Federal Criminal Prosecution while in Office* (Sept. 24, 1973).



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Rep. Maxine Waters  
Chairwoman  
House Committee on Financial Services



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Rep. Richard Neal  
Chair  
House Ways and Means Committee

# **EXHIBIT C**



**Congress of the United States**  
**Washington, DC 20515**

March 25, 2019

The Honorable William P. Barr  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Attorney General Barr:

Your March 24 letter concerning Special Counsel Mueller's report leaves open many questions concerning the conduct of the President and his closest advisors, as well as that of the Russian government during the 2016 presidential election. Accordingly, we formally request that you release the Special Counsel's full report to Congress no later than Tuesday, April 2. We also ask that you begin transmitting the underlying evidence and materials to the relevant committees at that time.

As you know, on March 14, the full House of Representatives approved H. Con. Res. 24, calling for the release of the Special Counsel's report by a vote of 420-0.<sup>1</sup> Each of our committees is currently engaged in oversight activities that go directly to the President's conduct, his attempts to interfere with federal and congressional investigations, his relationships and communications with the Russian government and other foreign powers, and/or other alleged instances of misconduct.

Your four-page summary of the Special Counsel's review is not sufficient for Congress, as a coequal branch of government, to perform this critical work. The release of the full report and the underlying evidence and documents is urgently needed by our committees to perform their duties under the Constitution. Those duties include evaluating the underlying facts and determining whether legislative or other reforms are required—both to ensure that the Justice

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<sup>1</sup> Roll Call Vote No. 125, 116th Cong., Mar. 14, 2019.

Department is able to carry out investigations without interference or obstruction by the President and to protect our future elections from foreign interference.

First, Congress must be permitted to make an independent assessment of the evidence regarding obstruction of justice. The determinations you have reached regarding obstruction and the manner in which you chose to characterize the Special Counsel's investigation only raise further questions, particularly in light of the Special Counsel's decision to refrain from making "a traditional prosecutorial judgment."<sup>2</sup> We also cannot evaluate your determination that "the report identifies no actions" that meet the elements of obstruction in the absence of the report, evidence and other materials.<sup>3</sup>

Second, we have no reason to question that Special Counsel Mueller made a well-considered prosecutorial judgment in two specific and narrow areas—whether the Trump campaign conspired to join Russia's election-related online disinformation and hacking and dissemination efforts. But it is vital for national security purposes that Congress be able to evaluate the full body of facts and evidence collected and evaluated by the Special Counsel, including all information gathered of a counterintelligence nature.

The provision of the report—in complete and unredacted form—and the underlying evidence and materials would be fully consistent with the Justice Department's practice and precedent with Congress, which the Department reinforced in recent years. With respect to the Hillary Clinton email investigation, the Department and the FBI released more than 880,000 pages of documents, publicly identified career officials involved in the case, and produced volumes of internal deliberative materials, including sensitive investigatory and classified materials.<sup>4</sup> In response to congressional requests and subpoenas regarding allegations of bias in the Russia investigation, the Department produced to congressional committees thousands of pages of highly sensitive law enforcement and classified investigatory and deliberative records related to that investigation—which remained open and ongoing at the time. Moreover, the Department produced to congressional committees in full, and then took the unprecedented step of releasing to the public in redacted form, multiple documents related to the surveillance of a United States person under the Foreign Intelligence Surveillance Act.<sup>5</sup>

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<sup>2</sup> Letter from U.S. Attorney General William Barr to Chairman Jerrold Nadler, H. Comm. on the Judiciary, et al., Mar. 24, 2019.


<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., *A Review of Allegations Regarding Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election*, hearing before the H. Comm. on the Judiciary, June 28, 2018 (statement of FBI Director Christopher Wray).

<sup>5</sup> Byron Tau, et al., *Trump Orders Declassification of Intelligence Documents Related to Former Adviser Carter Page*, WALL ST. JOURNAL, Sept. 17, 2018.


We look forward to receiving the report in full no later than April 2, and to begin receiving the underlying evidence and documents that same day.<sup>6</sup> To the extent that you believe applicable law limits your ability to comply, we urge you to begin the process of consultation with us immediately in order to establish shared parameters for resolving those issues without delay.

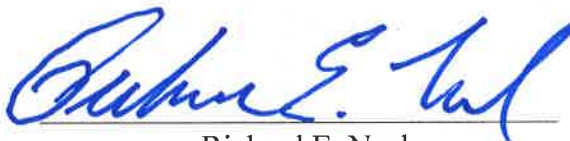
Sincerely,

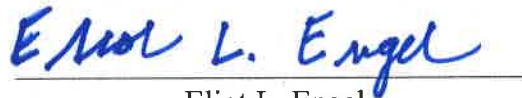
  
Jerrold Nadler  
Chairman  
House Committee on the Judiciary

  
Elijah E. Cummings  
Chairman  
House Committee on Oversight and Reform

  
Adam Schiff  
Chairman  
House Permanent Select Committee on Intelligence

  
Maxine Waters  
Chairwoman  
House Committee on Financial Services

  
Richard E. Neal  
Chairman  
House Committee on Ways and Means

  
Eliot L. Engel  
Chairman  
House Committee on Foreign Affairs

<sup>6</sup> As to materials that are subject to Rule 6(e) of the Federal Rules of Criminal Procedure, there is precedent for the release of such materials to Congress under similar circumstances. We look forward to discussing this issue to determine if we can reach a mutually acceptable accommodation.

# **EXHIBIT D**

**Congress of the United States**  
**Washington, DC 20515**

April 1, 2019

The Honorable William P. Barr  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Attorney General Barr:

On March 25, 2019, we sent you a letter requesting that you produce to Congress the full report of Special Counsel Robert S. Mueller III and its underlying evidence by Tuesday, April 2, 2019. “To the extent you believe the applicable law limits your ability” to produce the entire report, we urged that you “begin the process of consultation with us immediately” to resolve those issues without delay.<sup>1</sup> On Wednesday, April 3, 2019, the House Judiciary Committee plans to begin the process of authorizing subpoenas for the report and underlying evidence and materials. While we hope to avoid resort to compulsory process, if the Department is unwilling to produce the report to Congress in unredacted form, then we will have little choice but to take such action.

As Chairman Nadler explained in his phone conversation with you on March 27, Congress requires a complete and unedited copy of the Special Counsel’s report, as well as access to the evidence and materials underlying that report. During your confirmation hearing in January, you stated that your “goal will be to provide as much transparency as I can consistent with the law.” As such, if the Department believes it is unable to produce any of these materials in full due to rules governing grand jury secrecy, it should seek leave from the district court to produce those materials to Congress—as it has done in analogous situations in the past. To the extent you believe any other types of redactions are necessary, we again urge you to engage in an

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<sup>1</sup> Letter from Chairpersons Jerrold Nadler, H Comm. on the Judiciary, Elijah Cummings H. Comm. on Oversight & Reform, Adam Schiff, H. Perm. Select. Comm. on Intelligence, Maxine Waters, H. Comm. on Fin. Servs., Richard Neal, House Comm. on Ways & Means, and Eliot Engel, H. Comm. on Foreign Affairs, to Att’y Gen. William P. Barr (Mar. 25, 2019). *See also* Letter from Chairpersons Jerrold Nadler, H Comm. on the Judiciary, Elijah Cummings H. Comm. on Oversight & Reform, Adam Schiff, H. Perm. Select. Comm. on Intelligence, Maxine Waters, H. Comm. on Fin. Servs., Richard Neal, House Comm. on Ways & Means, and Eliot Engel, H. Comm. on Foreign Affairs, to Att’y Gen. William P. Barr, informing him of their expectation that he will make Special Counsel Robert Mueller’s report public “without delay and to the maximum extent permitted by law” (Feb. 22, 2019).

immediate consultation to address and alleviate any concerns you have about providing that information to Congress.<sup>2</sup>

We also reiterate our request that you appear before the Judiciary Committee as soon as possible—not in a month, as you have offered, but now, so that you can explain your decisions to first provide Congress with your characterization of the Mueller report as opposed to the report itself; to initiate a redaction process that withholds critical information from Congress; and to assume for yourself final authority over matters within Congress’s constitutional purview. In addition, as Chairman Nadler also requested on his call with you, we ask for your commitment to refrain from interfering with Special Counsel Mueller testifying before the Judiciary Committee—and before any other relevant committees—after the report has been released regarding his investigation and findings.

Congress is, as a matter of law, entitled to each of the categories of information you proposed to redact from the Special Counsel’s report in your March 29 letter.<sup>3</sup> In the attached appendix we provide a more complete legal analysis of each of the potential redaction categories your letter identified. We expect the Department will take all necessary steps without further delay—including seeking leave from the court to disclose the limited portions of the report that may involve grand jury materials—in order to satisfy your promise of transparency and to allow Congress to fulfill its own constitutional responsibilities.<sup>4</sup>

Full release of the report to Congress is consistent with both congressional intent and the interests of the American public. On March 14, 2019, by a vote of 420-0, the House unanimously passed H. Con. Res. 24, a resolution calling for “the full release” of the Special Counsel’s report to Congress, as well as the public release of the Special Counsel’s report except to the extent the disclosure of “any portion thereof is expressly prohibited by law.” The American people have also consistently and overwhelmingly supported release of the full report. The President himself has likewise called for its release in full.

The allegations at the center of Special Counsel Mueller’s investigation strike at the core of our democracy. Congress urgently needs his full, unredacted report and its underlying evidence in order to fulfill its constitutional role, including its legislative, appropriations, and

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<sup>2</sup> Congress is authorized by law and equipped to receive and examine the U.S. government’s most sensitive materials and information. The Department of Justice and the Federal Bureau of Investigation have long provided to relevant congressional committees sensitive law enforcement and investigatory information and records in complete and unredacted form, including those involving classified information, that are not provided to the general public.

<sup>3</sup> Letter from Att’y Gen. William P. Barr to Chairman Lindsey Graham, S. Comm. on the Judiciary, and Chairman Jerrold Nadler, H. Comm. on the Judiciary (Mar. 29, 2019).

<sup>4</sup> At a minimum, the Department should produce a detailed log of each redaction and the reasons supporting it in order to facilitate the accommodation process and to provide sufficient clarity for Congress to evaluate the Department’s claims.

oversight responsibilities. Congress can and has historically been provided with sensitive, unredacted, and classified material that cannot be provided to the general public. In addition, the American people deserve to be fully informed about these issues of extraordinary public interest, and therefore need to see the report and findings in Special Counsel Mueller's own words to the fullest extent possible.

For all these reasons, we hope you will produce to Congress an unredacted report and underlying materials to avoid the need for compulsory process.

Sincerely,



Jerrold Nadler

Chairman

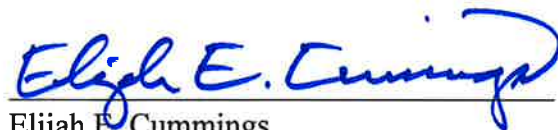
House Committee on the Judiciary



Maxine Waters

Chairwoman

House Committee on Financial Services



Elijah E. Cummings

Chairman

House Committee on Oversight and Reform



Richard E. Neal

Chairman

House Committee on Ways and Means



Adam Schiff

Chairman

House Permanent Select Committee on Intelligence



Eliot L. Engel

Chairman

House Committee on Foreign Affairs



**Appendix:**  
**The Department of Justice Must Produce the Full Mueller Report**

Congress urgently needs the full Special Counsel's report and the underlying evidence in order to fulfill its Article I constitutional functions, including its legislative, appropriations, and oversight responsibilities. Moreover, there is no basis for withholding from Congress the four categories of information described by the Attorney General in his March 29 letter to the House and Senate Judiciary Committees.<sup>1</sup>

1. Congress Urgently Requires the Full Report and the Evidence

The Attorney General's March 24 letter indicates that the Special Counsel found that President Trump may have criminally obstructed the Department's investigation of Russia's interference in the 2016 election and related matters.<sup>2</sup> The Special Counsel pointedly stated that the evidence the investigation uncovered "does not exonerate" the President of obstruction, and includes potentially criminal acts not yet known to the public.<sup>3</sup> It is difficult to overstate the seriousness of those actions if, in the wake of an attack by a hostile nation against our democracy, President Trump's response was to seek to undermine the investigation rather than take action against the perpetrators.

The longer the delay in obtaining this information, the more harm will accrue to Congress's independent duty to investigate misconduct by the President and to assure public confidence in the integrity and independence of federal law enforcement operations. These are not only matters of addressing the harm that has occurred; they are urgent ongoing concerns. As has been publicly reported and referenced in the March 24 letter, multiple open investigations referred by the Special Counsel to other U.S. Attorneys' offices may implicate the President or his campaign, transition, inauguration, or businesses. These critically important inquiries could be compromised if the President is seeking to interfere with them. Among other things, Congress has considered and continues to consider legislation to protect the integrity of these type of investigations against precisely the sorts of interference in which the President appears to have engaged.<sup>4</sup>

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<sup>1</sup> Letter from Att'y Gen. William P. Barr to Chairman Lindsey Graham, S. Comm. on the Judiciary, and Chairman Jerrold Nadler, H. Comm. on the Judiciary (Mar. 29, 2019).

<sup>2</sup> Letter from Att'y Gen. William P. Barr to Chairman Lindsey Graham and Ranking Member Dianne Feinstein, S. Comm. on the Judiciary, and Chairman Jerrold Nadler and Ranking Member Doug Collins, H. Comm. on the Judiciary (Mar. 24, 2019) (hereinafter "March 24 Letter").

<sup>3</sup> March 24 Letter at 3 (the report "addresses a number of actions by the President—*most of which* have been the subject of public reporting") (emphasis added).

<sup>4</sup> See H.R. 197 and S. 71, Special Counsel Independence and Integrity Act, 116th Cong. (2019); see also H.R. 1357, Special Counsel Reporting Act, 116th Cong. (2019); H.R. 1627, Abuse of Pardon Prevention Act, 116th Cong. (2019); H.R. 1348, Presidential Pardon Transparency Act, 116th Cong. (2019).



Moreover, the Judiciary Committee is engaged in an ongoing investigation of whether the President has undermined the rule of law, including by compromising the integrity of the Justice Department. Other committees are engaged in investigations related to whether the President, his associates, or members of his administration have engaged in other corrupt or unethical activities or are subject to foreign influence or compromise by actors abroad. Congress's authority "to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government" has been unquestioned since "the earliest times in its history."<sup>5</sup> That interest is at its height when Congress's oversight activities pertain to potentially illegal acts by the President. As a court determined in another context involving the release of a report about potential obstruction of justice by a President, "[i]t would be difficult to conceive of a more compelling need than that of this country for an unswervingly fair inquiry based on all the pertinent information."<sup>6</sup>

The March 24 letter also claims that the Special Counsel's decision not to reach a definitive legal conclusion about obstruction "leaves it to the Attorney General to determine whether the conduct described in the report constitutes a crime."<sup>7</sup> That view is fundamentally flawed. As a coequal branch of government—indeed, as the only branch of government that is expressly empowered by the Constitution to hold the President accountable—Congress must be permitted to assess the President's conduct for itself. The Attorney General cannot unilaterally make himself judge and jury. That is particularly so where the Attorney General has already expressed the view—in arguing against a theory of obstruction in this very investigation—that "there is no legal prohibition . . . against the President's acting on a matter in which he has a personal stake."<sup>8</sup>

The Attorney General's pre-confirmation memorandum on this topic also stated that "the determination of whether the President is making decisions based on 'improper' motives or whether he is 'faithfully' discharging his responsibilities is left to the people, through the election process, and the Congress."<sup>9</sup> Neither the American people nor Congress, however, can make any such a determination without all of Special Counsel Mueller's evidence, analysis, and findings—unfiltered and in his own words.

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<sup>5</sup> *Watkins v. United States*, 354 U.S. 178, 200 n.33 (1957) (internal quotations omitted)

<sup>6</sup> *In re Report & Rec. of June 5, 1972 Grand Jury Concerning Transmission of Evidence to House of Representatives*, 370 F. Supp. 1219, 1230 (D.D.C. 1974).

<sup>7</sup> March 24 Letter at 3.

<sup>8</sup> William P. Barr, *Memorandum Re: Mueller's "Obstruction" Theory* at 10, June 8, 2018 (emphasis omitted). Additionally, although the Attorney General's March 24 letter states that the absence of an underlying crime bears upon the President's intent, it is black-letter law that there need not be an underlying crime for obstruction of justice to occur. See, e.g., *United States v. Hopper*, 177 F.3d 828, 831 (9th Cir. 1999).

<sup>9</sup> *Id.* at 11.

The Special Counsel's investigation also confirmed that Russia engaged in extensive efforts to interfere in the 2016 presidential election, and Congress's need for that information is no less urgent. The Special Counsel's report, according to the Attorney General, describes "crimes committed by persons associated with the Russian government in connection with these efforts," including "efforts to conduct computer hacking operations designed to gather and disseminate information to influence the election."<sup>10</sup>

These hostile acts are ongoing: The Department has indicated in at least one other case that Russian influence efforts continued into the 2018 midterm elections.<sup>11</sup> The Director of National Intelligence likewise testified last year in regard to the 2018 midterm elections that Russia would continue to use "persistent and disruptive cyber operations" and would target "elections as opportunities to undermine democracy" both here and against our allies in Europe.<sup>12</sup> More recently, Director Coats warned that Russia and other adversaries "probably are already looking to the 2020 U.S. election" to conduct malign influence operations and that "Moscow may employ additional influence toolkits—such as spreading disinformation, conducting hack-and-leak operations, or manipulating data—in a more targeted fashion to influence U.S. policy, actions, and elections."<sup>13</sup> It is imperative that Congress have access to the Special Counsel's full descriptions and evidence of these crimes and malign influence operations that the Russian government or associated actors perpetrated against our democracy.

Moreover, the Attorney General's March 24 letter acknowledges "multiple offers from Russian-affiliated individuals to assist the Trump campaign."<sup>14</sup> The facts and circumstances uncovered by the Special Counsel's Office surrounding these and any other overtures by foreign actors, as well as the individuals associated with them and how they responded to such offers, are of vital importance to Congress. The Foreign Affairs Committee, for example, requires access to these facts as it investigates whether the foreign and financial entanglements of the President and his associates may be improperly influencing foreign policy in ways that serve their private interests rather than the national security of the United States. Moreover, the House Permanent Select Committee on Intelligence must have access to the full facts as it evaluates counterintelligence threats and risks during and since the 2016 U.S. election, and as it considers

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<sup>10</sup> March 24 Letter at 2.

<sup>11</sup> See Criminal Complaint ¶ 14, *United States v. Khusyaynova*, No. 1:18-mj-464 (E.D. Va. Sept. 28, 2018) (alleging Russian national participated in a conspiracy "to interfere with U.S. political and electoral processes, including the 2018 U.S. elections").

<sup>12</sup> Patricia Zengerle and Diona Chaicu, *U.S. 2018 Elections 'Under Attack' by Russia: U.S. Intelligence Chief*, Reuters, Feb. 13, 2018.

<sup>13</sup> Worldwide Threats: Hearing before the S. Select Comm. on Intelligence, 116th Cong. (Jan. 29, 2019) (Statement of Daniel R. Coats, Director of National Intelligence).

<sup>14</sup> March 24 Letter at 2.

remedies necessary to prevent, or mitigate to the greatest extent possible, the vulnerability of campaigns, or persons associated with them, to foreign influence or compromise operations.

Congressional committees have conducted multiple hearings regarding foreign influence operations and the security of our election systems and have proposed numerous legislative reforms to address vulnerabilities.<sup>15</sup> In an appropriations bill enacted into law last year, Congress allocated much-needed funding to support election security initiatives.<sup>16</sup> It is critical to legislation that has or will be introduced this year to understand foreign intelligence disinformation campaigns, risks to our election infrastructure security, evolving methods of voter targeting and suppression, and the manner in which foreign adversaries seek to exploit campaign vulnerabilities as well as the technology industry in our elections moving forward.

In addition, the House of Representatives' appropriations process for the next fiscal year is already underway—including for funding any election security, cybersecurity, and offensive or defensive counterintelligence operations needed to combat attacks during the 2020 election—with submission deadlines scheduled for April and appropriations packages expected to reach the House floor in June.<sup>17</sup> However, Congress cannot fully address the scope of these threats (whether through appropriations or other legislation) without a thorough accounting by the Special Counsel's Office of the attack that occurred in 2016. Indeed, it is difficult to envision any function of Congress more important than ensuring the integrity of our democratic elections, authorizing and appropriating funding for the relevant federal authorities, and authorizing critical national security programs.

## 2. The Application of Rule 6(e) is Limited and Does Not Bar Disclosures to Congress

The Attorney General has indicated that the Department is reviewing the Special Counsel's report to identify material whose disclosure may be limited by Federal Rule of Criminal Procedure 6(e), which prohibits certain disclosures of "matter[s] occurring before the grand jury." In a call with Chairman Nadler, the Attorney General suggested that redactions made in accordance with Rule 6(e) will be substantial. But even assuming Rule 6(e) applies with respect to disclosures to Congress,<sup>18</sup> the law clearly forbids the Department from making

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<sup>15</sup> See, e.g., Secure America from Russian Interference Act, H.R. 6437, 115th Cong. (2018); Defending Elections from Threats by Establishing Redlines Act, H.R. 4884, 115th Cong. (2018); Bot Disclosure Accountability Act, S. 3127, 115th Cong. (2018); H.R. 5011, Election Security Act, 115th Cong. (2018); For the People Act, H.R. 1, 116th Cong (2019).

<sup>16</sup> Pub. L. No. 115-141, Div. E, tit. V (2018).

<sup>17</sup> See Hearings, H. Comm. on Appropriations, 116th Cong. (2019); Paul M. Krawzak, *House appropriations may start markup in April*, RollCall, Mar. 19, 2019.

<sup>18</sup> See, e.g., *In re Grand Jury Inv. of Ven-Fuel*, 441 F. Supp. 1299, 1302, 1304-08 (M.D. Fla. 1977) (holding that Congress has "an independent right" under the Constitution to obtain requested documents regardless of whether they are subject to Rule 6(e)); *In re Proceedings of Grand Jury No. 81-1 (Miami)*, 669 F. Supp. 1072, 1075 (S.D.

sweeping designations as to any evidence that happens to have been presented to a grand jury or was obtained through a grand jury subpoena.

Rule 6(e) “does not ‘draw a veil of secrecy . . . over all matters occurring in the world that happen to be investigated by a grand jury.’”<sup>19</sup> “The mere fact that information has been presented to the grand jury does not” mean that the information is prohibited from disclosure.<sup>20</sup> Further, as the D.C. Circuit has made clear, the fact that evidence was obtained through a grand jury subpoena does not necessarily mean that it is barred from disclosure by Rule 6(e).<sup>21</sup> As a result, the Department cannot withhold documents or information simply because they were produced in response to a grand jury subpoena. Because a person receiving the documents would not know whether they were obtained through a grand jury subpoena or other means, “subpoenaed documents would not necessarily reveal a connection to a grand jury.”<sup>22</sup> Just last year, the D.C. Circuit reaffirmed this principal in *Bartko v. Dep’t of Justice*, where it made clear that “copies of specific records provided to a federal grand jury” were not covered by Rule 6(e) because “‘the mere fact the documents were subpoenaed fails to justify withholding under Rule 6(e).’”<sup>23</sup>

For this reason, it is clear the Department cannot withhold portions of the Special Counsel’s report merely because they discuss information that was presented to the grand jury or documents that were obtained through a grand jury subpoena. Likewise, the Department cannot withhold underlying evidence simply because it was presented to the grand jury or obtained through a grand jury subpoena. That is particularly so because the Special Counsel’s Office obtained a great deal of evidence by other means. The Special Counsel’s team interviewed numerous witnesses on a voluntary basis and acquired voluminous records without resorting to grand jury subpoenas.<sup>24</sup> Other evidence was obtained through different types of mandatory legal process, such as through the issuance of nearly 500 search warrants.<sup>25</sup> That evidence can of course be disclosed without implicating Rule 6(e). And because so much evidence was obtained

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Fla. 1987) (similar). *But see In re Grand Jury Investigation of Uranium Indus.*, Misc. 78-173, 1979 WL 1661, at \*4 (D.D.C. Aug. 16, 1979). No circuit court has squarely addressed this issue.

<sup>19</sup> *Labow v. Dep’t of Justice*, 831 F.3d 523, 529 (D.C. Cir. 2016) (quoting *Senate of the Com. of Puerto Rico v. Dep’t of Justice*, 823 F.2d 574, 582 (D.C. Cir. 1987) (R.B. Ginsburg, J.)).

<sup>20</sup> *Id.* at 529.

<sup>21</sup> *Id.* at 529-30.

<sup>22</sup> *Id.* at 529.

<sup>23</sup> 898 F.3d 51, 73 (D.C. Cir. 2018) (quoting *Labow*, 831 F.3d at 530).

<sup>24</sup> *See, e.g., Philip Rucker et al., A Mueller Mystery: How Trump Dodged a Special Counsel Interview—and a Subpoena Fight*, WASH. POST, Mar. 28, 2019 (quoting the President’s attorney, Rudolph Giuliani, who stated, “We allowed [the Special Counsel’s office] to investigate everybody, and [the White House] turned over every document they were asked for: 1.4 million documents.”).

<sup>25</sup> March 24 Letter at 1.

through these other means, the Department would have no basis to withhold materials or descriptions of materials that it happens to have gathered by issuing grand jury subpoenas. So long as those materials do not on their face “‘reveal a connection to a grand jury,’” Rule 6(e) does not bar their disclosure.<sup>26</sup>

As to testimony or other grand jury materials that are genuinely subject to Rule 6(e), the Department can and should work with the House Judiciary Committee to obtain the permission of the district court overseeing the grand jury to make disclosures to Congress on a confidential basis, as it has done in the past in analogous circumstances. The Department took that precise path after the grand jury considering evidence in the Watergate affair issued a report describing potentially criminal acts by President Nixon. The Justice Department filed briefs fully supporting disclosure of the report to the House Judiciary Committee, and made the obvious point that “[t]he need for the House to be able to make its profoundly important judgment on the basis of all available information is as compelling as any that could be conceived.”<sup>27</sup> Independent Counsel Kenneth Starr likewise sought the court’s authorization to disclose grand jury material regarding President Clinton to the House of Representatives.<sup>28</sup>

The district court would have ample authority to permit disclosure of relevant materials to Congress. As Chief Judge Howell, the judge overseeing this grand jury, explained in a recent opinion, “numerous courts have recognized [that] a district court retains an inherent authority to unseal and disclose grand jury material not otherwise falling within the enumerated exceptions to Rule 6(e).”<sup>29</sup> Indeed, every federal court of appeals to have considered this question has reached that conclusion.<sup>30</sup> Congress’s need for these materials is beyond compelling, and the public interest in Congress receiving these materials is at its height. President Trump, moreover, has

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<sup>26</sup> *Barko*, 898 F.3d at 73 (quoting *Labow*, 831 F.3d at 529).

<sup>27</sup> Mem. for the United States on Behalf of the Grand Jury at 16, *In re Report & Rec. of June 5, 1972 Grand Jury*, Misc. No. 74-21 (D.D.C. Mar. 5, 1974).

<sup>28</sup> See Order, *In re Madison Guaranty Savings & Loan Assoc.*, Div. No. 94-1 (D.C. Cir. Special Div. July 7, 1998).

<sup>29</sup> *In re App. to Unseal Dockets Related to the Independent Counsel’s 1998 Investigation of President Clinton*, 308 F. Supp. 3d 314, 323 (D.D.C. 2018).

<sup>30</sup> *Id.* at 323-24. See *Carlson v. United States*, 837 F.3d 753, 763 (7th Cir. 2016); *In re Craig*, 131 F.3d 99, 103 (2d Cir. 1997); *In re Pet. to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1268 (11th Cir. 1984); see also *Pitch v. United States*, 915 F.3d 704, 708-09 (11th Cir. 2019); *Haldeman v. Sirica*, 501 F.2d 714, 715 (D.C. Cir. 1974) (court was “in general agreement with” the district court’s decision to release the Watergate grand jury’s report to Congress). The D.C. Circuit heard argument last fall in a case involving a historian who seeks the release of grand jury material involving an incident that occurred in the 1950s pursuant to the court’s inherent authority to release materials otherwise covered by Rule 6(e). *McKeever v. Barr*, No. 17-5149. The facts of that case are obviously distinct from those presented here. As the Department explained in its brief in *McKeever*, “[t]he question in this appeal is whether . . . a district court may order the disclosure of secret grand jury records solely for reasons of historical or academic interest.”

expressed public support for the report's release.<sup>31</sup> As such, the Department should immediately request that these materials be released to Congress.

The Attorney General has refused thus far to work with Congress in that regard. At his confirmation hearing, however, the Attorney General stated: "I . . . believe it is very important that the public and Congress be informed of the results of the special counsel's work. My goal will be to provide as much transparency as I can consistent with the law."<sup>32</sup> The most efficacious way to honor that commitment would be to join with the House Judiciary Committee in seeking expedited disclosure of any Rule 6(e) material to Congress, and to refer any questions about the scope of Rule 6(e)'s application to independent court review.

### 3. Any Potential Claim of Executive Privilege Has Been Waived

Although the Attorney General's March 24 letter made no mention of executive privilege, his March 29 letter states that "there are no plans to submit the report to the White House for a privilege review," because the President "intends to defer" to the Attorney General on those issues. Whatever that may mean, it would be highly improper for the Department to conceal portions of the report based on claims of executive privilege on behalf of the President. As an initial matter, the Department's own long-standing policy is that executive privilege "should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers."<sup>33</sup>

In any event, the President and the White House have waived any claims of executive privilege. The White House voluntarily disclosed millions of documents to the Special Counsel's office and permitted multiple senior officials to be interviewed by the Special Counsel's team, without asserting any type of privilege.<sup>34</sup> Having voluntarily disclosed this evidence, the President cannot now seek to invoke executive privilege to block its release. As the D.C. Circuit has held in an analogous context, regarding waiver of attorney-client privilege, "[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others."<sup>35</sup> Moreover, the White House has similarly shared information and documents with numerous former White House

<sup>31</sup> Liam Stack, *Trump Says Mueller Report Should Be Made Public: 'Let People See It,'* N.Y. TIMES, Mar. 20, 2019.

<sup>32</sup> *The Nomination of the Honorable William Pelham Barr to be Attorney General of the United States*, hearing before the S. Comm. on the Judiciary, Jan. 15, 2019 (statement of the Hon. William Barr).

<sup>33</sup> Robert B. Shanks, Office of Legal Counsel, *Congressional Subpoenas of Department of Justice Investigative Files*, 8 Op. O.L.C. 252, 267 (1984).

<sup>34</sup> See Rucker et al., *supra* note 24; Michael Schmidt and Maggie Haberman, *White House Counsel, Don McGahn, Has Cooperated Extensively in Mueller Inquiry*, N.Y. TIMES, Aug. 18, 2018 (noting that no privilege was asserted).

<sup>35</sup> *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

officials and their private counsel.<sup>36</sup> The D.C. Circuit has expressly held that the White House “waive[s] its claims of privilege in regard to [] specific documents that it voluntarily reveal[s] to third parties outside the White House.”<sup>37</sup>

Lastly, in the unlikely event that the White House has preserved privilege as to any of the evidence underlying the Mueller report, the public interest in disclosure would still overwhelmingly outweigh the President’s interest in secrecy. The privilege pertaining to presidential communications is not absolute. Just as the Supreme Court determined in *United States v. Nixon*, the public interest here in the “fair administration of justice” outweighs the President’s “generalized interest in confidentiality.”<sup>38</sup>

4. Ongoing Investigations, Classified Information, and Privacy and Reputational Interests of Third Parties Should Not Prevent Release to Congress

The fact that certain investigations remain ongoing cannot justify the Department withholding critical evidence from Congress that pertains to Russia’s interference in our federal elections or obstruction of justice by the President. Indeed, during the previous Congress, the Department produced to congressional committees thousands of pages of highly sensitive law enforcement and classified investigatory and deliberative records.<sup>39</sup> Many of these were related to *this very same investigation*—which of course was open and ongoing at the time.

Similarly, the mere presence of classified information in the Mueller report or in underlying evidence cannot justify withholding evidence from Congress, which is well equipped to handle classified information and does so on a daily basis. The Department can provide any classified materials to the appropriate committees for handling in secure facilities. It can also permit the Intelligence Community to review the report on an expedited basis in order to share with Congress whatever equities the Intelligence Community feels may be implicated by the release of specific information contained in the report or any underlying materials. Additionally, to the extent the Special Counsel’s Office is in possession of underlying evidence that is particularly sensitive, the relevant committees are in a position to work with the Department to reach an accommodation to ensure appropriate handling as Congress has in the past on numerous occasions. However, the Department should not be able to simply invoke the same reasons for redacting the report from public view as a shield against disclosure to a coequal branch of government.

<sup>36</sup> See, e.g., Schmidt and Haberman, *supra* note 34.

<sup>37</sup> *In re Sealed Case*, 121 F.3d 729, 741-42 (D.C. Cir. 1997).

<sup>38</sup> 418 U.S. 683, 713 (1974).

<sup>39</sup> See, e.g., *DOJ hands over new classified documents on Russia probe to Congress*, Associated Press, June 23, 2018; Charlie Savage, *Carter Page FISA Released by Justice Department*, N.Y. TIMES, July 21, 2018.

Finally, the Department also should not be able to keep from Congress information related to the “reputational interests of peripheral third parties” as referenced in the Attorney General’s March 29 letter. To the extent the Special Counsel has developed information relative to President Trump’s family members (including those employed by the White House) or his associates, campaign employees, consultants, advisers, and others within the scope of the investigation, that should not be withheld from Congress. It is precisely the type of information that the relevant committees need to perform their oversight, legislative, and other responsibilities. There is no constitutionally recognized privilege that would apply in such instances, and there is ample precedent for provision of such information, as recently as the last Congress.



# **EXHIBIT E**



**Permanent Select Committee  
on Intelligence  
U.S. House of Representatives**

March 27, 2019

The Honorable William P. Barr  
Attorney General of the United States

The Honorable Rod J. Rosenstein  
Deputy Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

The Honorable Christopher Wray  
Director  
Federal Bureau of Investigation  
935 Pennsylvania Avenue, N.W.  
Washington, D.C. 20535

Dear Attorney General Barr, Deputy Attorney General Rosenstein, and Director Wray:

The investigation led by Special Counsel Robert S. Mueller III is of surpassing national importance and public interest. To discharge its distinct constitutional and statutory oversight responsibility, the House Permanent Select Committee on Intelligence (“Committee”) requires full visibility into the Special Counsel’s Office’s report, findings, and underlying evidence and information.

The Special Counsel’s investigation originated within the Federal Bureau of Investigation (“Bureau”) as a counterintelligence probe, the existence of which then-Director James B. Comey confirmed publicly on March 20, 2017 in testimony before the Committee. Upon the appointment of Special Counsel Mueller, the Department of Justice (“Department”) authorized the Special Counsel to assume responsibility for the investigation.<sup>1</sup>

As the congressional committee of the House of Representatives charged with oversight of intelligence and counterintelligence matters, the Committee has an independent constitutional duty and express statutory right to examine the intelligence and counterintelligence information

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<sup>1</sup> *Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters*, Order No. 3915-2017, Office of the Deputy Attorney General, May 17, 2017.

gathered by the Special Counsel's Office, assess the counterintelligence and national security implications, and formulate appropriate remedies in response.

Since the congressional intelligence committees' permanent establishment in 1976 and 1977, the Department, the Bureau, and other Intelligence Community elements, consistent with their statutory obligations, have routinely provided the committees with intelligence and counterintelligence briefings, information, and deeply sensitive investigative records, especially when profound public interest creates a need for congressional oversight.

Now that the Special Counsel has concluded his investigation and submitted his report to Attorney General Barr, the Department and the Bureau must keep the Committee "fully and currently informed" of that information and the Special Counsel's findings.<sup>2</sup> The Committee therefore requests that the Department and Bureau provide to it all materials, regardless of form and classification, obtained or produced by the Special Counsel's Office in the course of the investigation, including but not limited to any addenda or annexes to the full report, or separate intelligence or counterintelligence-related reports; scope-related materials regarding the investigation's parameters, areas of inquiry, and subjects; investigative records and materials, including any documents such as FD-302s and FD-1023s produced from January 2015 to the present date which relate to any U.S. government contacts with any person formally or informally associated with the Trump campaign; and raw reporting or finished analysis involving intelligence or counterintelligence-related information.

Special Counsel Mueller and senior members of his office – as well as other relevant senior officials from the Department, Bureau, and Intelligence Community – must also brief the full Committee on the investigation's scope and areas of inquiry, its findings, and the intelligence and counterintelligence information gathered in the course of and related to the investigation.

The Committee's request for testimony and documents is without prejudice to, and does not obviate the need for the Department to fulfill, the March 25, 2019 request for the full report – in complete and unredacted form – by April 2, 2019 from the Chairs of the Committees on the Judiciary, Intelligence, Oversight and Reform, Financial Services, Ways and Means, and Foreign Affairs.

Consistent with the Chairs' deadline, the Committee expects that production of the materials identified above begin on April 2, 2019. The Committee will also engage the Department and Bureau directly to secure testimony at the appropriate time.

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<sup>2</sup> 50 U.S.C. § 3092 (requiring, among other things, that the heads of all departments, agencies, or entities of the United States government involved in intelligence activities keep the congressional intelligence committees fully and currently informed of all intelligence activities, and to furnish to the congressional intelligence committees any information or material concerning intelligence activities which is within the custody or control of the departments, agency, or entity of the United States government); *see also* 50 U.S.C. § 3093 (defining "intelligence" to include "foreign intelligence" and "counterintelligence").

We look forward to the Department and the Bureau's continued cooperation with the Committee on this matter of grave national importance.

Sincerely,



Adam B. Schiff  
Chairman



Devin Nunes  
Ranking Member

CC The Honorable Daniel Coats, Director of National Intelligence

# **EXHIBIT F**





Permanent Select Committee  
on Intelligence  
U.S. House of Representatives

April 25, 2019

The Honorable William P. Barr  
Attorney General of the United States

The Honorable Rod J. Rosenstein  
Deputy Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

The Honorable Christopher Wray  
Director  
Federal Bureau of Investigation  
935 Pennsylvania Avenue, N.W.  
Washington, D.C. 20535

Dear Attorney General Barr, Deputy Attorney General Rosenstein, and Director Wray:

On March 27, we wrote to you to request all materials, regardless of form and classification, obtained or produced by the Special Counsel's Office during its investigation, with production to the House Permanent Select Committee on Intelligence ("Committee") to begin by April 2. To date, the Committee has received no response from you to that request.

In our prior letter, we made clear that, for the Committee to discharge its unique constitutional and statutory responsibilities, the Committee requires full visibility into the Special Counsel's Office's unredacted report, findings, and underlying evidence and information. In particular, we underscored that, with the Special Counsel's fact-gathering work now concluded, the Committee has an obligation to examine the foreign intelligence and counterintelligence information gathered by the Special Counsel's Office, assess the counterintelligence and national security implications, and consider whether legislation or other appropriate remedies are required in response.

On April 18, Attorney General Barr released to Congress and the public the same redacted version of the Special Counsel's report. Directly related to our March 27 request, Volume I of the report clarifies the process by which foreign intelligence and counterintelligence information uncovered in the course of the Special Counsel's investigation was shared outside of the Special Counsel's Office:

“From its inception, the [Special Counsel’s] Office recognized that its investigation could identify foreign intelligence and counterintelligence information relevant to the [Federal Bureau of Investigation’s] broader national security mission. FBI personnel who assisted the Office established procedures to identify and convey such information to the FBI. The FBI’s Counterintelligence Division met with the Office regularly for that purpose for most of the Office’s tenure. For more than the past year, the FBI also embedded personnel at the Office who did not work on the Special Counsel’s investigation, but whose purpose was to review the results of the investigation and to send - in writing - summaries of foreign intelligence and counterintelligence information to FBIHQ [FBI Headquarters] and FBI Field Offices. Those communications and other correspondence between the Office and the FBI contain information derived from the investigation, not all of which is contained in this Volume. This Volume is a summary. It contains, in the Office’s judgment, that information necessary to account for the Special Counsel’s prosecution and declination decisions and to describe the investigation’s main factual results.”<sup>1</sup>

Unfortunately, as the report makes clear, the Department of Justice and the FBI failed to keep the Committee “fully and currently informed” of this important foreign intelligence and counterintelligence information, as required by law.<sup>2</sup> The Department and the Bureau did not keep the Committee apprised of this information – whether at the full Committee level or through more restricted bipartisan leadership briefings – contrary to long-standing practice regarding significant counterintelligence matters.

It is deeply unfortunate, moreover, that the Department and the Bureau failed to respond to the Committee’s March 27 request, including to initiate a dialogue to facilitate the production of this information to the Committee and to schedule associated briefings requested in our letter. The Department also failed to respond to the Committee’s April 18 request for Special Counsel Mueller to testify before the Committee.

In addition to the complete unredacted report, the Committee’s request includes all classified and unclassified evidence and information obtained or generated by the Special Counsel’s Office that may relate to foreign intelligence or counterintelligence matters. The fact that evidence and information may have been gathered during a criminal investigation, including through grand jury process, in no way diminishes their nature or value as foreign intelligence or

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<sup>1</sup> Special Counsel Robert S. Mueller, III, *Report on the Investigation Into Russian Interference in the 2016 Presidential Election*, Volume I of II, March 2019, p. 13.

<sup>2</sup> See 50 U.S.C. § 3092 (requiring, among other things, that the heads of all departments, agencies, or entities of the United States government involved in intelligence activities keep the congressional intelligence committees fully and currently informed of all intelligence activities, and to furnish to the congressional intelligence committees upon request any information or material concerning intelligence activities which is within the custody or control of the departments, agency, or entity of the United States government); see also 50 U.S.C. § 3003(1) (defining “intelligence” to include “foreign intelligence” and “counterintelligence”).

counterintelligence information or the Committee's need for them.<sup>3</sup> This includes information regarding efforts by the Russian government to contact Americans in furtherance of Russian intelligence objectives. The Committee's request, therefore, is unique and distinct from the House Judiciary Committee's independent interest in obtaining the unredacted report and underlying evidence.

The Committee seeks the Department and the Bureau's cooperation in good faith. Absent meaningful compliance by the Department and Bureau with the Committee's requests by **Thursday, May 2**, however, the Committee will have no choice but to resort to compulsory process on **Friday, May 3** to compel production of documents responsive to the Committee's request.

To facilitate the Department and the Bureau's cooperation with the Committee, Committee staff are prepared to meet this **Friday, April 26** to discuss the Committee's requests with more specificity and establish a reasonable document production timeline that fulfills the Committee's requests and takes into account legitimate logistical considerations of the Department and the Bureau.

Sincerely,



Adam B. Schiff  
Chairman



Devin Nunes  
Ranking Member

CC The Honorable Daniel Coats, Director of National Intelligence

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<sup>3</sup> To the extent any such information relates to grand jury matters, Rule 6(e) of the Federal Rules of Criminal Procedure poses no bar to disclosure of such materials to the Committee. Under the exception set forth in Rule 6(e)(3)(D), the Department of Justice "may disclose any grand-jury matter involving foreign intelligence, counterintelligence [], or foreign intelligence information," as well as any grand-jury matter involving "grave hostile acts of a foreign power," "a threat of domestic or international sabotage or terrorism," or "clandestine intelligence gathering activities by an intelligence service or network of a foreign power." Fed. R. Crim. P. 6(e)(3)(D).



# **EXHIBIT G**

Chairman or Authorized Member

**PROOF OF SERVICE**

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Subpoena for

The Honorable William P. Barr, Attorney General of the United States

Address United States Department of Justice

950 Pennsylvania Ave., NW, Washington DC, 20530

before the Committee on the Judiciary


*U.S. House of Representatives*  
*116th Congress*

Served by (print name) Aaron Hiller

Title Deputy Chief Counsel, House Judiciary Committee

Manner of service Electronic

Date 04/19/2019

Signature of Server 

Address 2138 Rayburn House Office Building

Washington, D.C. 20515

**SCHEDULE**

You are hereby required to produce the following in accordance with the attached Definitions and Instructions:

1. The complete and unredacted version of the report submitted on or about March 22, 2019 by Special Counsel Robert Mueller, pursuant to his authority under 28 C.F.R. § 600.8(c), entitled, "Report on the Investigation into Russian Interference in the 2016 Presidential Election" ("the Report"). This includes, but is not limited to, all summaries, exhibits, indices, tables of contents or other tables or figures, appendices, supplements, addenda or any other attachments whether written or attached in a separate electronic format.
2. All documents referenced in the Report.
3. All documents obtained and investigative materials created by the Special Counsel's Office.

### DEFINITIONS

As used in this subpoena, the following terms shall be interpreted in accordance with these definitions:

1. "And," and "or," shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.
2. "Any" includes "all," and "all" includes "any."
3. "Communication(s)" means the transmittal of information by any means, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic message including email, text message, instant message, MMS or SMS message, encrypted message, message application, social media, or otherwise.
4. "Employee" means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.
5. "Document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail ("e-mail"), instant messages, calendars, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, power point presentations, spreadsheets, and work sheets. The term "document" includes all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments to the foregoing, as well as any attachments or appendices thereto.
6. "Documents in your possession, custody or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party. This includes but is not limited to documents that are or were held by your attorneys.
7. "Each" shall be construed to include "every," and "every" shall be construed to include "each."
8. "Including" shall be construed broadly to mean "including, but not limited to."
9. "Investigative materials" means any document created, generated, authored, or obtained by the Special Counsel's Office pursuant to the Special Counsel's Investigation, including but not limited to, prosecution memoranda, FBI 302 interview reports, signals intelligence, witness interviews, written interrogatories and responses, search warrants, subpoenas, Foreign

Intelligence Surveillance Act applications, notes, transcripts, reports, whether classified or unclassified.

10. "Person" or "persons" means natural persons, firms, partnerships, associations, corporations, subsidiaries, division, departments, joint ventures proprietorships, syndicates, or other legal business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units, thereof.
11. "Referenced" means cited, quoted, mentioned, described, alluded to, contained, incorporated, reproduced, or identified in any manner whatsoever.
12. "Relating to" shall mean discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, comprising, showing, setting forth, considering, recommending, concerning, or pertinent to that subject in any manner whatsoever.
13. "Special Counsel's Office" means the office created pursuant to Department of Justice Order No. 3915-17 issued by the Acting Attorney General on May 17, 2017 appointing Robert S. Mueller III as Special Counsel, and its employees.
14. "Special Counsel's Investigation" means the investigation conducted by the Special Counsel's Office pursuant to Department of Justice Order No. 3915-17 issued by the Acting Attorney General on May 17, 2017.
15. "The Report" means the complete and unredacted version of the report submitted on or about March 22, 2019 by Special Counsel Robert Mueller, pursuant to his authority under 28 C.F.R. § 600.8(c), entitled, "Report on the Investigation into Russian Interference in the 2016 Presidential Election."

### INSTRUCTIONS

1. In complying with this subpoena, you should produce all responsive documents in unredacted form that are in your possession, custody, or control or otherwise available to you, regardless of whether the documents are possessed directly by you. If a document is referenced in the Report in part, you should produce it in full in a complete and unredacted form.
2. Documents responsive to the subpoena should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that a document is withheld in full or in part on any basis, including a claim of privilege, you should provide a log containing the following information concerning every such document: (i) the reason the document is not being produced; (ii) the type of document; (iii) the general subject matter; (iv) the date, author, addressee, and any other recipient(s); (v) the relationship of the author and addressee to each other; and (vi) any other description necessary to identify the document and to explain the basis for not producing the document. If a claimed privilege applies to only a portion of any document, that portion only should be withheld and the remainder of the document should be produced. As used herein, "claim of privilege" includes, but is not limited to, any claim that a document either may or must be withheld from production pursuant to any law, statute, rule, policy or regulation.
4. Any objections or claims of privilege are waived if you fail to provide an explanation of why full compliance is not possible and a log identifying with specificity the ground(s) for withholding each document prior to the subpoena compliance date.
5. In complying with the subpoena, be apprised that the Committee does not recognize: any purported non-disclosure privileges associated with the common law including, but not limited to the deliberative-process privilege, the attorney-client privilege, and attorney work product protections; or any purported contractual privileges, such as non-disclosure agreements.
6. Any assertion of any such non-constitutional legal bases for withholding documents or other materials, shall be of no legal force and effect and shall not provide a justification for such withholding or refusal, unless and only to the extent that the Committee has consented to recognize the assertion as valid.
7. Pursuant to 5 U.S.C. § 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.
8. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.
9. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, or has been placed into the possession, custody, or control of any third party and cannot be provided in response to this subpoena, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control, or was placed in the possession, custody, or control of a third party, including, but not limited to (a) how the document was disposed of; (b) the name, current address, and telephone number of the person who currently has possession, custody, or

control over the document; (c) the date of disposition; and (d) the name, current address, and telephone number of each person who authorized said disposition or who had or has knowledge of said disposition.

10. If any document responsive to this subpoena cannot be located, describe with particularity the efforts made to locate the document and the specific reason for its disappearance, destruction or unavailability.
11. In the event that any entity, organization, or individual named in the subpoena has been, or is currently, known by any other name, the subpoena should be read also to include such other names under that alternative identification.
12. All documents should be produced with Bates numbers affixed. The Bates numbers must be unique, sequential, fixed-length numbers and must begin with a prefix referencing the name of the producing party (e.g., ABCD-000001). This format must remain consistent across all productions. The number of digits in the numeric portion of the format should not change in subsequent productions, nor should spaces, hyphens, or other separators be added or deleted. All documents should be Bates-stamped sequentially and produced sequentially.
13. Documents produced pursuant to this subpoena should be produced in the order in which they appear in your files and should not be rearranged. Any documents that are stapled, clipped, or otherwise fastened together should not be separated. Documents produced in response to this subpoena should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this subpoena was issued. Indicate the office or division and person from whose files each document was produced.
14. Responsive documents must be produced regardless of whether any other person or entity possesses non-identical or identical copies of the same document.
15. Produce electronic documents as created or stored electronically in their original electronic format. Documents produced in electronic format should be organized, identified, and indexed electronically, in a manner comparable to the organization structure called for in Instruction 13 above.
16. Data may be produced on CD, DVD, memory stick, USB thumb drive, hard drive, or via secure file transfer, using the media requiring the least number of deliverables. Label all media with the following:
  - a. Production date;
  - b. Bates range;
  - c. Disk number (1 of X), as applicable.
17. If a date or other descriptive detail set forth in this subpoena referring to a document, communication, meeting, or other event is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.



18. The subpoena is continuing in nature and applies to any newly discovered document, regardless of the date of its creation. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.
19. Two sets of each production shall be delivered, one set to the Majority Staff and one set to the Minority Staff. Production sets shall be delivered to the Majority Staff in Room 2138 of the Rayburn House Office Building and the Minority Staff in Room 2142 of the Rayburn House Office Building. You should consult with Committee Majority Staff regarding the method of delivery prior to sending any materials.
20. If compliance with the subpoena cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production. In the event that any responsive documents or other materials contain classified information, please immediately contact Committee staff to discuss how to proceed.
21. Upon completion of the document production, please submit a written certification, signed by you or by counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the subpoena have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's subpoena or in anticipation of receiving the Committee's subpoena, and (3) all documents identified during the search that are responsive have been produced to the Committee, identified in a log provided to the Committee, or otherwise identified as provided herein.
22. A cover letter should be included with each production including the following information:
  - a. List of each piece of media (hard drive, thumb drive, DVD or CD) included in the production by the unique number assigned to it, and readily apparent on the physical media;
  - b. List of fields in the order in which they are listed in the metadata load file;
  - c. The paragraph(s) and/or clause(s) in the Committee's subpoena to which each document responds;
  - d. Time zone in which emails were standardized during conversion (email collections only);
  - e. Total page count and bates range for the entire production, including both hard copy and electronic documents.
23. You need not produce documents which are readily publicly available.
24. As to Item 3 in the Schedule, please consult with the Committee to determine a reasonable time period for compliance.

# **EXHIBIT H**

## SUBPOENA

### BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Donald F. McGahn II

You are hereby commanded to be and appear before the  
Committee on the Judiciary

of the House of Representatives of the United States at the place, date, and time specified below.

- ☒ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: 2138 Rayburn House Office Building, Washington, D.C., 20515

Date: May 7, 2019

Time: 10:00am

- ☐ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: \_\_\_\_\_

Date: \_\_\_\_\_ (and continuing until completed)

Time: \_\_\_\_\_

- ☒ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: 2141 Rayburn House Office Building, Washington, D.C., 20515

Date: May 21, 2019

Time: 10:00am

To any authorized staff member or the U.S. Marshals Service

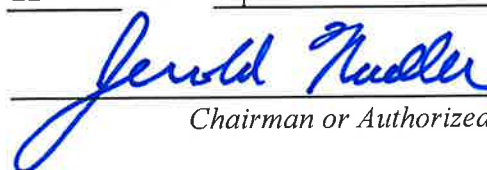
\_\_\_\_\_ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at

the city of Washington, D.C. this 22 day of April, 2019.

Attest:

  
Clerk

  
Chairman or Authorized Member

**PROOF OF SERVICE**

---

Subpoena for

Donald F. McGahn II

Address c/o William A. Burck, Esq., Quinn, Emanuel, Urquhart, & Sullivan, LLP

1300 I Street NW, Suite 900, Washington, DC, 20005

before the Committee on the Judiciary

*U.S. House of Representatives*  
*116th Congress*


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Served by (print name) Aaron Hiller

Title Deputy Chief Counsel, House Judiciary Committee

Manner of service Electronic

Date April 22, 2019

Signature of Server 

Address 2138 Rayburn House Office Building

Washington, D.C. 20515

**SCHEDULE**

In accordance with the attached Definitions and Instructions, you are hereby required to produce all documents and communications in your possession, custody or control referring or relating to:

1. Statements by Michael Flynn to the Federal Bureau of Investigation regarding contacts with Sergey Kislyak.
2. The Federal Bureau of Investigation and Department of Justice's investigation of Michael Flynn.
3. Meetings with Department of Justice officials or employees relating to Michael Flynn and underlying evidence relating to Michael Flynn.
4. The resignation or termination of Michael Flynn.
5. Sean Spicer's February 14, 2017 public statements about Michael Flynn's resignation.
6. President Trump's contacts with James Comey on or about January 27, 2017, February 14, 2017, March 30, 2017, and April 11, 2017.
7. The termination of James Comey, including but not limited to any documents or communications relating to draft termination letters, White House Counsel memoranda, or the May 9, 2017 Rod Rosenstein memorandum to Jeff Sessions entitled "Restoring Public Confidence in the FBI."
8. Meetings or communications involving Federal Bureau of Investigation or Department of Justice officials or employees relating to the resignation or termination of James Comey.
9. Jeff Sessions's recusal from any matters arising from the campaigns for President of the United States.
10. Reversing or attempting to reverse Jeff Sessions's recusal from any matters.
11. The resignation or termination, whether contemplated or actual, of Jeff Sessions.
12. The resignation or termination, whether contemplated or actual, of Rod Rosenstein.
13. The resignation or termination, whether contemplated or actual, of Special Counsel Robert Mueller.
14. Your resignation or termination, whether contemplated or actual.
15. The appointment of Special Counsel Robert Mueller.
16. Alleged conflicts of interest on the part of Special Counsel Robert Mueller or other employees of the Special Counsel's Office.
17. Public statements and/or requests to correct the record or deny reports that President Trump asked for Special Counsel Robert Mueller to be removed as Special Counsel.

18. Memoranda directing White House officials or employees to avoid direct contact or communication with the Department of Justice or Jeff Sessions.
19. Meetings or communications with Dana Boente or other Department of Justice officials or employees relating to whether the President was being investigated by the Department of Justice or Federal Bureau of Investigation.
20. Meetings or communications with Department of Justice officials or employees relating to James Comey's testimony before Congress.
21. The President maintaining possession of Jeff Sessions's resignation letter.
22. Communications about Special Counsel Mueller's investigation, including but not limited to whether any action taken, proposed or discussed by President Trump or anyone acting on his behalf may constitute obstruction of justice or any violation of law.
23. President Trump's exposure in the Special Counsel Investigation relating to "other contacts," "calls," or "ask re Flynn" as mentioned in Volume II, page 82 of the Report.
24. Statements or communications relating to press reports that President Trump was under investigation.
25. Paul Manafort's cooperation with the Special Counsel's Office.
26. The June 9, 2016 Trump Tower meeting.
27. The July 8, 2017 statement and related statements released in the name of Donald Trump Jr. regarding the Trump Tower meeting.
28. Prosecuting or investigating James Comey or Hillary Clinton.
29. Presidential pardons, whether possible or actual, for Paul Manafort, Michael Flynn, Michael Cohen, Rick Gates, Roger Stone, individuals associated with the Trump Campaign, or individuals involved in matters before the U.S. Attorney's Office for the Southern District of New York.
30. Selecting Jeff Sessions's replacement through a recess appointment or appointing an Acting Attorney General under the Federal Vacancies Reform Act.
31. The SDNY Investigations, the recusal of U.S. Attorney Geoffrey Berman from the SDNY Investigations, or the reassignment or potential reassignment of SDNY employees from the SDNY Investigations.
32. Statements by Michael Cohen or White House officials to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence regarding the timing of the Trump Organization's efforts to develop a property in Moscow, including but not limited to drafts of such statements and communications about such drafts or final statements.

33. Any payment, or potential payment, to any person or entity by Michael Cohen, Essential Consultants LLC, or American Media Inc. ("AMI") for the benefit of Donald Trump or the Trump Campaign, including but not limited to any documents relating to the reimbursement of Cohen, Essential Consultants LLC, or AMI for any such payments, and any documents relating to the omission or inclusion of information about liabilities associated with such payments on Donald Trump's Public Financial Disclosure Reports (OGE Form 278e) filed in 2017 and 2018.
34. Communications relating to United States imposed sanctions or potential sanctions against the Russian Federation from June 16, 2015 to October 18, 2018, including but not limited to the sanctions imposed pursuant to the Magnitsky Act.
35. Communications with the Executive Office of the President regarding your response to the March 4, 2019 document request by the House Committee on the Judiciary.
36. Any documents referenced in the Report.

### DEFINITIONS

As used in this subpoena, the following terms shall be interpreted in accordance with these definitions:

1. "58<sup>th</sup> Presidential Inaugural Committee" means the entity registered under FEC ID # C00629584 as well as its parent companies, subsidiary companies, affiliated entities, agents, officials, and instrumentalities.
2. "And," and "or," shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information that might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neutral genders.
3. "Any" includes "all," and "all" includes "any."
4. "Communication(s)" means the transmittal of information by any means, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, mail, releases, electronic message including email, text message, instant message, MMS or SMS message, encrypted message, message application, social media, or otherwise.
5. "Employee" means any past or present agent, borrowed employee, casual employee, consultant, contractor, de facto employee, detailee, fellow, independent contractor, intern, joint adventurer, loaned employee, officer, part-time employee, permanent employee, provisional employee, special government employee, subcontractor, or any other type of service provider.
6. "Document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, call records, electronic mail ("e-mail"), instant messages, calendars, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, power point presentations, spreadsheets, and work sheets. The term "document" includes all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments to the foregoing, as well as any attachments or appendices thereto.
7. "Documents in your possession, custody or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party. **This includes but is not limited to documents that are or were held by your attorneys.**
8. "Each" shall be construed to include "every," and "every" shall be construed to include "each."



9. "Government" shall include any government's present and former agencies, branches, units, divisions, subdivisions, districts, public corporations, employees, elected and appointed officials, ambassadors, diplomats, emissaries, authorities, agents, assignees, and instrumentalities. This includes, but is not limited to, any government-controlled business entities, entities in which the government has a financial interest, and any person acting or purporting to act on the government's behalf.
10. "Including" shall be construed broadly to mean "including, but not limited to."
11. "Person" or "persons" means natural persons, firms, partnerships, associations, corporations, subsidiaries, division, departments, joint ventures proprietorships, syndicates, or other legal business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units, thereof.
12. "Referenced" means cited, quoted, mentioned, described, alluded to, contained, incorporated, reproduced, or identified in any manner whatsoever.
13. "Relating to" shall mean discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, comprising, showing, setting forth, considering, recommending, concerning, or pertinent to that subject in any manner whatsoever.
14. "The Russian Federation" shall include the Government of the Russian Federation, as the term "Government" is defined above.
15. "Special Counsel's Office" means the office created pursuant to Department of Justice Order No. 3915-17 issued by the Acting Attorney General on May 17, 2017 appointing Robert S. Mueller III as Special Counsel, and its employees.
16. "Special Counsel's Investigation" means the investigation conducted by the Special Counsel's Office pursuant to Department of Justice Order No. 3915-17 issued by the Acting Attorney General on May 17, 2017.
17. "SDNY Investigations" shall include any investigation or prosecution conducted by the U.S. Attorney's Office for the Southern District of New York relating to: (i) Michael Cohen; (ii) the Trump Organization; (iii) the Trump Campaign; and (iv) the 58<sup>th</sup> Presidential Inaugural Committee.
18. "The Report" means the complete and unredacted version of the report submitted on or about March 22, 2019 by Special Counsel Robert Mueller, pursuant to his authority under 28 C.F.R. § 600.8(c), entitled, "Report on the Investigation into Russian Interference in the 2016 Presidential Election."
19. "Trump Campaign" for purposes of this subpoena shall include Donald J. Trump for President, Inc., as well as its parent companies, subsidiary companies, affiliated entities, agents, officials, and instrumentalities.

20. The “Trump Organization” for purposes of this subpoena shall include the Trump Organization, Inc., The Trump Organization LLC, and their parent companies, subsidiary companies, affiliated entities, agents, officials, and instrumentalities.
21. The “Trump Tower Meeting” for purposes of this subpoena shall reference the June 9, 2016 Trump Tower meeting attended by the following Donald Trump Jr., Paul Manafort, Kushner, Natalia Veselnitskaya, Rob Goldstone, and Rinat Akhmetshin.

### **INSTRUCTIONS**

1. In complying with this subpoena, you should produce all responsive documents in unredacted form that are in your possession, custody, or control or otherwise available to you, regardless of whether the documents are possessed directly by you. If a document is referenced in the Report in part, you should produce it in full in a complete and unredacted form.
2. Documents responsive to the subpoena should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that a document is withheld in full or in part on any basis, including a claim of privilege, you should provide a log containing the following information concerning every such document: (i) the reason the document is not being produced; (ii) the type of document; (iii) the general subject matter; (iv) the date, author, addressee, and any other recipient(s); (v) the relationship of the author and addressee to each other; and (vi) any other description necessary to identify the document and to explain the basis for not producing the document. If a claimed privilege applies to only a portion of any document, that portion only should be withheld and the remainder of the document should be produced. As used herein, "claim of privilege" includes, but is not limited to, any claim that a document either may or must be withheld from production pursuant to any law, statute, rule, policy or regulation.
4. In the event that a document is withheld in full or in part on the basis of a privilege asserted by or on behalf of the White House, or at the request of the White House, please also include the following information in your privilege log:
  - a. The date on which you or any attorney representing you received the document or any copy thereof from the White House, received access to that document from the White House, or removed that document or any copy thereof from the White House;
  - b. The name of the person or persons who provided the document to you or your attorney;
  - c. The name of any lawyer or other agent or third party outside the White House who, to your knowledge, reviewed the document.
  - d. You should log each responsive document as to which you have directed us to the White House, and each document that was previously in your attorneys' possession, custody or control.
5. Any objections or claims of privilege are waived if you fail to provide an explanation of why full compliance is not possible and a log identifying with specificity the ground(s) for withholding each withheld document prior to the request compliance date.
6. In complying with the request, be apprised that (unless otherwise determined by the Committee) the Committee does not recognize: any purported non-disclosure privileges associated with the common law including, but not limited to the deliberative-process privilege, the attorney-client privilege, and attorney work product protections; any purported privileges or protections from disclosure under the Freedom of Information Act; or any purported contractual privileges, such as non-disclosure agreements.

7. Any assertion of any such non-constitutional legal bases for withholding documents or other materials, shall be of no legal force and effect and shall not provide a justification for such withholding or refusal, unless and only to the extent that the Committee has consented to recognize the assertion as valid.
8. Pursuant to 5 U.S.C. § 552(d), the Freedom of Information Act (FOIA) and any statutory exemptions to FOIA shall not be a basis for withholding any information.
9. Pursuant to 5 U.S.C. § 552a(b)(9), the Privacy Act shall not be a basis for withholding information.
10. If any document responsive to this subpoena was, but no longer is, in your possession, custody, or control, or has been placed into the possession, custody, or control of any third party and cannot be provided in response to this subpoena, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control, or was placed in the possession, custody, or control of a third party, including, but not limited to (a) how the document was disposed of; (b) the name, current address, and telephone number of the person who currently has possession, custody, or control over the document; (c) the date of disposition; and (d) the name, current address, and telephone number of each person who authorized said disposition or who had or has knowledge of said disposition.
11. If any document responsive to this subpoena cannot be located, describe with particularity the efforts made to locate the document and the specific reason for its disappearance, destruction or unavailability.
12. In the event that any entity, organization, or individual named in the subpoena has been, or is currently, known by any other name, the subpoena should be read also to include such other names under that alternative identification.
13. All documents should be produced with Bates numbers affixed. The Bates numbers must be unique, sequential, fixed-length numbers and must begin with a prefix referencing the name of the producing party (e.g., ABCD-000001). This format must remain consistent across all productions. The number of digits in the numeric portion of the format should not change in subsequent productions, nor should spaces, hyphens, or other separators be added or deleted. All documents should be Bates-stamped sequentially and produced sequentially.
14. Documents produced pursuant to this subpoena should be produced in the order in which they appear in your files and should not be rearranged. Any documents that are stapled, clipped, or otherwise fastened together should not be separated. Documents produced in response to this subpoena should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this subpoena was issued. Indicate the office or division and person from whose files each document was produced.
15. Responsive documents must be produced regardless of whether any other person or entity possesses non-identical or identical copies of the same document.

16. Produce electronic documents as created or stored electronically in their original electronic format. Documents produced in electronic format should be organized, identified, and indexed electronically, in a manner comparable to the organization structure called for in Instruction 13 above.
17. Data may be produced on CD, DVD, memory stick, USB thumb drive, hard drive, or via secure file transfer, using the media requiring the least number of deliverables. Label all media with the following:
  - a. Production date;
  - b. Bates range;
  - c. Disk number (1 of X), as applicable.
18. If a date or other descriptive detail set forth in this subpoena referring to a document, communication, meeting, or other event is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
19. The subpoena is continuing in nature and applies to any newly discovered document, regardless of the date of its creation. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.
20. Two sets of each production shall be delivered, one set to the Majority Staff and one set to the Minority Staff. Production sets shall be delivered to the Majority Staff in Room 2138 of the Rayburn House Office Building and the Minority Staff in Room 2142 of the Rayburn House Office Building. You should consult with Committee Majority Staff regarding the method of delivery prior to sending any materials.
21. If compliance with the subpoena cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production. In the event that any responsive documents or other materials contain classified information, please immediately contact Committee staff to discuss how to proceed.
22. Upon completion of the document production, please submit a written certification, signed by you or by counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the subpoena have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's subpoena or in anticipation of receiving the Committee's subpoena, and (3) all documents identified during the search that are responsive have been produced to the Committee, identified in a log provided to the Committee, or otherwise identified as provided herein.
23. A cover letter should be included with each production including the following information:

- a. List of each piece of media (hard drive, thumb drive, DVD or CD) included in the production by the unique number assigned to it, and readily apparent on the physical media;
- b. List of fields in the order in which they are listed in the metadata load file;
- c. The paragraph(s) and/or clause(s) in the Committee's subpoena to which each document responds;
- d. Time zone in which emails were standardized during conversion (email collections only);
- e. Total page count and bates range for the entire production, including both hard copy and electronic documents.

# **EXHIBIT I**

**THE WHITE HOUSE**

WASHINGTON

May 20, 2019

The Honorable Jerrold Nadler  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
Washington, D.C. 20515

Dear Chairman Nadler:

I write in further reference to the subpoena issued by the Committee on the Judiciary of the United States House of Representatives (the “Committee”) to Donald F. McGahn II on April 22, 2019. My previous letter, dated May 7, 2019, informed you that Acting Chief of Staff to the President Mick Mulvaney had directed Mr. McGahn not to produce the White House records sought by the subpoena because they remain subject to the control of the White House and implicate significant Executive Branch confidentiality interests and executive privilege. Accordingly, I asked that the Committee direct any request for such records to the White House. The subpoena also directs Mr. McGahn to appear to testify before the Committee at 10:00 a.m. on Tuesday, May 21, 2019.

The Department of Justice (the “Department”) has advised me that Mr. McGahn is absolutely immune from compelled congressional testimony with respect to matters occurring during his service as a senior adviser to the President. *See* Memorandum for Pat A. Cipollone, Counsel to the President, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, *Re: Testimonial Immunity Before Congress of the Former Counsel to the President* (May 20, 2019). The Department has long taken the position—across administrations of both political parties—that “the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee.” *Immunity of the Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. 191, 191 (2007) (quoting *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 4 (1999) (opinion of Attorney General Janet Reno)); *Immunity of the Counsel to the President from Compelled Congressional Testimony*, 20 Op. O.L.C. 308, 308 (1996). That immunity arises from the President’s position as head of the Executive Branch and from Mr. McGahn’s former position as a senior adviser to the President, specifically Counsel to the President.

There is no question that the position of Counsel to the President falls within the scope of the immunity. The three previous opinions cited above directly addressed the immunity of Counsel to the President: Harriet Miers was a former Counsel to President George W. Bush, Beth Nolan was the current Counsel to President Clinton, and Jack Quinn was the current Counsel to President Clinton. Accordingly, Mr. McGahn cannot be compelled to appear before the Committee because “[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance




The Honorable Jerrold Nadler  
Page 2

of his constitutionally assigned executive functions.” *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. at 5. The constitutional immunity of current and former senior advisers to the President exists to protect the institution of the Presidency and, as stated by Attorney General Reno, “may not be overborne by competing congressional interests.” *Id.*

Because of this constitutional immunity, and in order to protect the prerogatives of the Office of the Presidency, the President has directed Mr. McGahn not to appear at the Committee’s scheduled hearing on Tuesday, May 21, 2019. This long-standing principle is firmly rooted in the Constitution’s separation of powers and protects the core functions of the Presidency, and we are adhering to this well-established precedent in order to ensure that future Presidents can effectively execute the responsibilities of the Office of the Presidency. I attach the legal opinion provided by the Department of Justice for the Committee’s review.

Please do not hesitate to contact me directly if you have any questions or would like to discuss this matter.

Sincerely,  
  
Pat A. Cipollone  
Counsel to the President

cc: The Honorable Doug Collins, Ranking Member

# **EXHIBIT J**

THE WHITE HOUSE

WASHINGTON

June 18, 2019

The Honorable Jerrold Nadler  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

Dear Chairman Nadler:

I write concerning the subpoena issued by the Committee on the Judiciary (the “Committee”) to Hope Hicks on May 21, 2019. The subpoena directs Ms. Hicks to testify before the Committee on Wednesday, June 19, 2019. As you are aware, Ms. Hicks served as a senior adviser to the President in the White House, holding the titles of Assistant to the President and Director of Strategic Communications, as well as Assistant to the President and White House Communications Director. The subpoena appears to seek testimony from Ms. Hicks concerning her service in the White House. As explained below, Ms. Hicks is absolutely immune from being compelled to testify before Congress with respect to matters occurring during her service as a senior adviser to the President.

The Department of Justice (“Department”) has advised me that, with respect to the subpoena issued by the Committee on May 21, 2019, Ms. Hicks is absolutely immune from compelled congressional testimony with respect to matters occurring during her service as a senior adviser to the President. As you know, “[t]he Department has long taken the position—across administrations of both political parties—that ‘the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional Committee.’” Letter from Pat A. Cipollone, Counsel to the President, to Rep. Jerrold Nadler (May 20, 2019) (quoting *Immunity of the Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. 191, 191 (2007)); see also, e.g., *Immunity of the Counsel to the President from Compelled Congressional Testimony*, 20 Op. O.L.C. 308, 308 (1996). That immunity arises from the President’s position as head of the Executive Branch and from Ms. Hicks’s former position as a senior adviser to the President. “Subjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions.” *Assertion of Executive Privilege with Respect to Clemency Decisions*, 23 Op. O.L.C. 1, 5 (1999).

As the Department has recognized, “[w]hile a senior presidential adviser, like other executive officials, could rely on executive privilege to decline to answer specific questions at a hearing, the privilege is insufficient to ameliorate several threats that compelled testimony poses to the independence and candor of executive councils.” Memorandum for Pat A. Cipollone, Counsel to the President, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, *Re: Testimonial Immunity Before Congress of the Former Counsel to the President*, 43

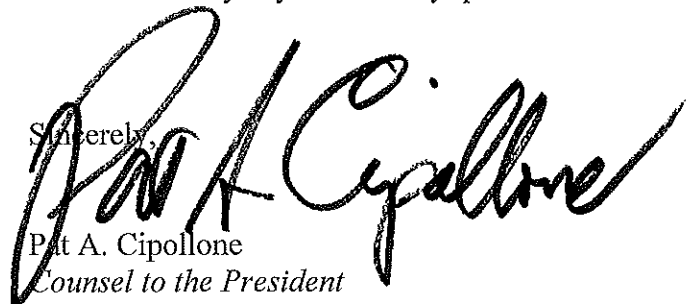
The Honorable Jerrold Nadler  
Page 2

Op. O.L.C. \_\_\_, \*6 (May 20, 2019). “[C]ompelled congressional testimony ‘create[s] an inherent and substantial risk of inadvertent or coerced disclosure of confidential information,’ despite the availability of claims of executive privilege with respect to the specific questions asked during such testimony.” *Id.* (quoting *Immunity of the Assistant to the President and Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. \_\_\_, \*4 (July 15, 2014)). In addition, the threat of compelled interrogation about confidential communications with the President or his senior staff “could chill presidential advisers from providing unpopular advice or from fully examining an issue with the President or others.” *Id.* Finally, given the frequency with which testimony of a senior presidential adviser would fall within the scope of executive privilege, compelling such an adviser’s appearance is unlikely to promote any valid legislative interests. *Id.* at \*6-7.

Because of this constitutional immunity, and in order to protect the prerogatives of the Office of President, the President has directed Ms. Hicks not to answer questions before the Committee relating to the time of her service as a senior adviser to the President. The long-standing principle of immunity for senior advisers to the President is firmly rooted in the Constitution’s separation of powers and protects the core functions of the Presidency, and we are adhering to this well-established precedent in order to ensure that future Presidents can effectively execute the responsibilities of the Office of President. It is our understanding that Ms. Hicks’s limited testimony before the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence was not inconsistent with this principle of immunity.

We recognize the Committee has also expressed an interest in questioning Ms. Hicks about her time working for the President-elect during the presidential transition. Much of Ms. Hicks’s work during this period involved discussions with the President-elect and his staff relating to the decisions the President-elect would be making once he assumed office. Accordingly, her responses to specific questions about this period would likely implicate executive branch confidentiality interests concerning that decisionmaking process. In order to preserve the President’s ability to assert executive privilege over such information, a member of my office will attend Ms. Hicks’s testimony on June 19.

Finally, I note that the Committee and the Department are engaged in an ongoing accommodation process, and that accommodation process may resolve the Committee’s requests for information. Please do not hesitate to contact me directly if you have any questions or would like to discuss this matter further.

Sincerely,  
  
Pat A. Cipollone  
Counsel to the President

cc: The Honorable Doug Collins, Ranking Member

# **EXHIBIT K**



**U.S. Department of Justice**

Office of Legislative Affairs

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Office of the Assistant Attorney General

*Washington, D.C. 20530*

May 1, 2019

The Honorable Jerrold Nadler  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Nadler:

On April 18, 2019, the Attorney General took the extraordinary step of publicly disclosing the report of Special Counsel Robert S. Mueller, III, with as few redactions as possible. Under the regulations that govern the Special Counsel, his report was a "confidential," internal Department of Justice (Department) document, which contained the kind of prosecutorial deliberations that the Department almost never releases publicly. 28 C.F.R. § 600.8(c); 64 Fed. Reg. 37,038, 37,041 (July 9, 1999). Nonetheless, in response to requests from you and other Members, and in the interest of transparency, the Attorney General disclosed the report and volunteered to appear to testify before the Committee. In addition, the Attorney General offered you and other congressional leaders the chance to review the report with redactions only for grand-jury information (because disclosure of that information is prohibited by law). That would permit you to review 98.5% of the report, including 99.9% of Volume II, which discusses the investigation of the President's actions.

Regrettably, before even reviewing the less-redacted version or awaiting the Attorney General's testimony, you served a subpoena demanding (i) the unredacted report, (ii) every document cited therein, and (iii) "all documents obtained and investigative materials created" by the Special Counsel's office over nearly two years. In other words, the Committee has demanded all of the Special Counsel's investigative files, which consist of millions of pages of classified and unclassified documents, bearing upon more than two dozen criminal cases and investigations, many of which are ongoing. You served such a subpoena knowing that the Department could not lawfully provide the unredacted report, that the Committee lacks any legitimate legislative purpose for seeking the complete investigative files, and that processing your requests would impose a significant burden on the Department.

The Department has always been willing to follow the constitutionally mandated accommodation process to address legitimate congressional requests for information. In this case, both the Attorney General's decision to release the report with minimal



redactions and his willingness to testify were already extraordinary accommodations reflecting his respect for meeting the legitimate information needs of the Committee and its Members. But this subpoena is not legitimate oversight. The requests in the subpoena are overbroad and extraordinarily burdensome. More importantly, these requests would pose a fundamental threat to the confidentiality of law enforcement files and the Department's commitment to keep law enforcement investigations free of political interference.

For reasons integral to our law enforcement responsibilities, the Department's practice is to reveal information about our criminal investigations only when we decide to prosecute, and then generally only in court, in our indictments and subsequent filings. When we decline to prosecute, we abide by fundamental principles of privacy and due process and refrain from publicly assessing the information that was assembled regarding individuals who were investigated but not prosecuted. Attorney General Barr's decision to release the confidential report reflected an extraordinary accommodation of the congressional and public interest in the results of the Special Counsel's investigation and was justified because it was critical for the American people to know the Special Counsel's conclusion that the Trump campaign did not conspire or coordinate with Russia in its attempts to interfere with the 2016 presidential election.

We are disappointed, however, that the Committee has responded to this extraordinary accommodation by reflexively issuing a subpoena that threatens to swallow the extremely important principle that the Department must preserve the confidentiality of its investigations. It is one thing for the Attorney General to disclose a written report of prosecutorial decisions, but quite another thing to open up the entirety of the investigative file to congressional review. Allowing your Committee to use Justice Department investigative files to re-investigate the same matters that the Department has investigated and to second-guess decisions that have been made by the Department would not only set a dangerous precedent, but would also have immediate negative consequences.

Over the past year, you have repeatedly expressed concern that the Special Counsel's investigation would not remain free of outside interference. You now know, as reported in the Attorney General's March 22, 2019 letter, that the Special Counsel completed his investigation, on his own terms and on his own schedule, and that there were no instances where the Attorney General or his predecessors overruled the Special Counsel's judgment. That does not, however, mean that we now may tolerate the specter of congressional interference with the autonomy of the Department's law enforcement functions. *See, e.g., Assertion of Executive Privilege over Documents Generated in Response to Congressional Investigation into Operation Fast and Furious*, 36 Op. O.L.C. \_\_\_, at \*4-5 (June 19, 2012) (opinion of Attorney General Holder) (citing the need "to ensure that critical ongoing law enforcement actions are not compromised and that law enforcement decisionmaking is not tainted by even the appearance of political influence").

The Department must ensure that it may continue to conduct law enforcement investigations free of outside interference, particularly in high-profile cases that receive intense public scrutiny. To that end, the Department has long resisted congressional attempts to rummage through its investigative files. As Attorney General Michael Mukasey recognized in advising the President to assert executive privilege over FBI



investigative reports bearing upon the Valerie Plame investigation, the Department has a “concern about the prospect of committees of Congress obtaining confidential records from Justice Department criminal investigative files for the purpose of addressing highly politicized issues in public committee hearings.” *Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 10-11 (2008).

Attorney General Robert Jackson similarly declined to provide Congress with the FBI’s investigative files related to counterespionage activities. Writing “with the approval of and at the direction of [President Roosevelt],” Jackson explained that disclosing such information would “be of serious prejudice to the future usefulness of the Federal Bureau of Investigation,” which often relies upon information that is “given in confidence and can only be obtained upon pledge not to disclose its sources.” *Position of the Executive Department Regarding Investigative Reports*, 40 Op. Att’y Gen. 45, 46 (1941). Furthermore, such disclosure “might also be the grossest kind of injustice to innocent individuals,” since “[i]nvestigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people.” *Id.* at 47. Noting that a “long line of distinguished predecessors” had “uniformly taken the same view,” Jackson concluded that “the public interest does not permit general access to Federal Bureau of Investigation reports for information by the many congressional committees who from time to time ask it.” *Id.*

Consistent with these precedents, “[t]he Department’s longstanding policy is to decline to provide Congressional committees with access to open law enforcement files.” Letter for John Linder, Chairman, Subcommittee on Rules and Organization of the House, from Robert Raben, Assistant Attorney General, Office of Legislative Affairs at 3 (Jan. 27, 2000). “[P]roviding a Congressional committee with confidential information about active criminal investigations would place the Congress in a position to exert pressure or attempt to influence the prosecution of criminal cases.” *Id.* at 4. In addition, “the disclosure of documents from our open files could also provide a ‘road map’ of the Department’s ongoing investigations. . . . The investigation would be seriously prejudiced by the revelation of the direction of the investigation, information about the evidence that the prosecutors have obtained, and assessments of the strengths and weaknesses of various aspects of the investigation.” *Id.*

Even with respect to closed law enforcement matters, the Department must protect the numerous confidentiality interests implicated by law enforcement information—starting with our “broad confidentiality interest in materials that reflect [the Department’s] internal deliberative process.” *Id.* at 5. “We have long been concerned about the chilling effect that would ripple throughout government if prosecutors, policy advisors at all levels and line attorneys believe that their honest opinion . . . may be the topic of debate in Congressional hearings or floor debates.” *Id.* In addition, “[t]he Department takes very seriously its responsibility to respect the privacy interests of individuals about whom information is developed during the law enforcement process.” *Id.* We also have substantial confidentiality interests regarding sensitive law enforcement and intelligence information, such as information regarding confidential sources, methods, and techniques. In this case, the Special Counsel’s investigation received the White House’s cooperation in



making witnesses and documents available. Similar access by the Department could be impeded in future investigations if the White House were given reason to believe that Congress would receive each and every document shared with the Department.

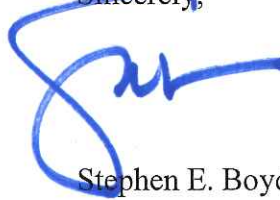
Against this backdrop of the Department's compelling need to protect the autonomy and effectiveness of its investigations, as well as the extraordinary steps the Attorney General has already taken to accommodate the Committee's needs, the Committee has not articulated any legitimate legislative purpose for its request for all of the Special Counsel's investigative files. The Committee has no legitimate role in demanding law enforcement materials with the aim of simply duplicating a criminal inquiry—which is, of course, a function that the Constitution entrusts exclusively to the Executive Branch. If the Department were to provide law enforcement materials every time a high-profile and politically charged investigation was underway, we would irredeemably undermine the integrity and independence of law enforcement investigations. This is especially true here where the Committee has demanded every single document bearing upon over two dozen separate criminal cases and investigations, and where the only point of the demand seems to be to generate public disclosures that the Special Counsel's extensive report did not already produce and to second-guess prosecution and declination decisions made by the Department. This is not a legitimate use of congressional investigative authority.

For these reasons, the Department is unable to provide the Committee with the Special Counsel's investigative files. In reaching this conclusion, we do not close the door on engaging with the Committee about potential further accommodations in response to a properly focused and narrowed inquiry that is supported by a legitimate legislative purpose. If and when the Committee has completed its review of the Special Counsel's report and has identified particularized and legitimate needs for information that are not satisfied by the report itself, we will be prepared to engage further with the Committee and to respond to your specific requests for information. Our response, of course, must remain consistent with long-standing Department obligations, including the need to protect the autonomy of criminal investigations, the obligation to protect grand-jury information, and the legitimate confidentiality interests of the Executive Branch.

We are also unable to honor your specific request for the completely unredacted Special Counsel's report because disclosing grand-jury information in response to congressional oversight requests is prohibited by law. Rule 6(e) of the Federal Rules of Criminal Procedure provides that matters occurring before a grand jury must be kept secret, except in certain specifically enumerated circumstances. *See McKeever v. Barr*, No. 17-5149, 2019 WL 1495027, at \*2 (D.C. Cir. Apr. 5, 2019). Rule 6(e) contains no exception that would permit the Department to provide grand-jury information to the Committee in connection with its oversight role. Therefore, the Department may not provide the grand-jury information that the subpoena requests. The Department has, however, provided you and the Ranking Member (as well as other members of leadership in the House and Senate) with access to a version of the report that redacts only the grand-jury information that cannot be disclosed under Rule 6(e). As noted above, this minimally redacted version would permit review of 98.5% of the report, including 99.9% of Volume II, which discusses the investigation of the President's actions.

Please do not hesitate to contact this office if we may be of further assistance.

Sincerely,

A handwritten signature in blue ink, appearing to be 'S. Boyd', with a large loop at the end.

Stephen E. Boyd  
Assistant Attorney General

cc: The Honorable Doug Collins  
Ranking Member

# **EXHIBIT L**

JERROLD NADLER, New York  
CHAIRMAN

ZOE LOFGREN, California  
SHEILA JACKSON LEE, Texas  
STEVE COHEN, Tennessee  
HENRY C. "HANK" JOHNSON, JR., Georgia  
TED DEUTCH, Florida  
KAREN BASS, California  
CEDRIC L. RICHMOND, Louisiana  
HAKEEM S. JEFFRIES, New York  
DAVID CICILLINE, Rhode Island  
ERIC SWALWELL, California  
TED LIEU, California  
JAMIE RASKIN, Maryland  
PRAMILA JAYAPAL, Washington  
VAL DEMINGS, Florida  
LOU CORREA, California  
MARY GAY SCANLON, Pennsylvania  
SYLVIA GARCIA, Texas  
JOSEPH NEGUSE, Colorado  
LUCY McBATH, Georgia  
GREG STANTON, Arizona  
MADELEINE DEAN, Pennsylvania  
DEBBIE MUCARSEL-POWELL, Florida  
VERONICA ESCOBAR, Texas

DOUG COLLINS, Georgia  
RANKING MEMBER

F. JAMES SENSENBRENNER, JR., Wisconsin  
STEVE CHABOT, Ohio  
LOUIE GOHMERT, Texas  
JIM JORDAN, Ohio  
KEN BUCK, Colorado  
JOHN RATCLIFFE, Texas  
MARTHA ROBY, Alabama  
MATT GAETZ, Florida  
MIKE JOHNSON, Louisiana  
ANDY BIGGS, Arizona  
TOM McCLINTOCK, California  
DEBBIE LESKO, Arizona  
GUY RESCHENTHALER, Pennsylvania  
BEN CLINE, Virginia  
KELLY ARMSTRONG, Alabama  
GREG STEUBE, Florida

ONE HUNDRED SIXTEENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951  
<http://www.house.gov/judiciary>

May 3, 2019

The Honorable William P. Barr  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Attorney General Barr:

I write to respond to the Department's letter of May 1, 2019 refusing to comply with the Judiciary Committee's subpoena for the unredacted Mueller report, the documents it cites, and other underlying materials. As you know, the Committee has repeatedly engaged with your staff in writing, by telephone and in person to discuss a way forward on the subpoena.

At the outset, we note that the Department has never explained why it is willing to allow only a small number of Members to view a less-redacted version of the report, subject to the condition that they cannot discuss what they have seen with anyone else. The Department also remains unwilling to work with the Committee to seek a court order permitting disclosure of materials in the report that are subject to Federal Rule of Criminal Procedure 6(e). And the Department has offered no reason whatsoever for failing to produce the evidence underlying the report, except for a complaint that there is too much of it and a vague assertion about the sensitivity of law enforcement files.

Nonetheless, the Committee remains willing to negotiate a reasonable accommodation with the Department. First, the Committee requests that the Department reconsider its refusal to allow all Members of Congress and appropriate staff to view redacted portions of the report that are not subject to Rule 6(e) in a secure location in Congress. As the Committee has already indicated, Congress has ample means of providing for safe storage of these materials; and it is routinely entrusted with the responsibility to protect classified and other sensitive information.

Second, the Committee renews its request that the Department work jointly with Congress to seek a court order permitting disclosure of materials covered by Rule 6(e). The Department has asserted that Rule 6(e) “contains no exception” that would permit such disclosure, but courts have provided Rule 6(e) materials to Congress under the rule’s “judicial proceeding” exception in the past,<sup>1</sup> and other exceptions may also be available.<sup>2</sup>

Third, the Committee is willing to prioritize a specific, defined set of underlying investigative and evidentiary materials for immediate production. As indicated in item two of the Committee’s subpoena, the Committee has a heightened interest in obtaining access to the investigative and evidentiary materials specifically cited in the report. This discrete and readily identifiable set of documents includes reports from witness interviews (commonly known as “302s”) and items such as contemporaneous notes taken by witnesses of relevant events. Since these materials are publicly cited and described in the Mueller report, there can be no question about the Committee’s need for and right to this underlying evidence in order to independently evaluate the facts that Special Counsel Mueller uncovered and fulfill our constitutional duties. As the Mueller report makes clear, this need is amplified where, as here, Department policy prohibits the indictment of a sitting President and instead relies upon Congress to evaluate whether constitutional remedies are appropriate. In addition, to the extent these materials are classified or contain sensitive law enforcement information, we are prepared to maintain their confidentiality as we regularly do with similar information.

Fourth, as we have already indicated in the instructions to the subpoena, we are also prepared to discuss limiting and prioritizing our request in item three of the subpoena for other underlying evidence obtained by the Special Counsel’s office.

Accommodation requires negotiation that takes into account the legitimate interests and responsibilities of both Congress and the Department. Your proposed conditions are a departure from accommodations made by previous Attorneys General of both parties. As recently as last Congress, the Department produced more than 880,000 pages of sensitive investigative materials pertaining to its investigation of Hillary Clinton, as well as much other material relating to the then-ongoing Russia investigation. That production included highly classified material, notes from FBI interviews, internal text messages, and law enforcement memoranda. The volume of documents cited in the Special Counsel’s report is surely smaller, and the Committee is willing

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<sup>1</sup> See, e.g., *In re Grand Jury Proceedings of Grand Jury No. 81-1 (Miami)*, 669 F. Supp. 1072, 1075-76 (S.D. Fla. 1987).

<sup>2</sup> See Fed. R. Crim. P. 6(e)(3)(D) (allowing disclosure of grand jury materials “involving foreign intelligence, counterintelligence . . . , or foreign intelligence information” to “any federal law enforcement, intelligence, . . . or national security official to assist the official receiving the information in the performance of that official’s duties”); *id.* (allowing disclosure of grand jury materials relating to “a threat of attack or other grave hostile acts of a foreign power or its agent . . . , or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent” to “any appropriate federal . . . official”).



to work with the Department to prioritize production of materials even within that defined category. Additionally, in the most recent prior instance in which the Department conducted an investigation of a sitting President, Kenneth Starr produced a 445-page report to Congress along with 18 boxes of accompanying evidence.

Lastly, it cannot go unremarked that, in refusing to comply with congressional oversight requests, the Department has repeatedly asserted that Congress's requests do not serve "legitimate" purposes. This is not the Department's judgment to make. Congress's constitutional, oversight and legislative interest in investigating misconduct by the President and his associates cannot be disputed. The Committee has ample jurisdiction under House Rule X(l) to conduct oversight of the Department, undertake necessary investigations, and consider legislation regarding the federal obstruction of justice statutes, campaign-related crimes, and special counsel investigations, among other things.

The Committee is prepared to make every realistic effort to reach an accommodation with the Department. But if the Department persists in its baseless refusal to comply with a validly issued subpoena, the Committee will move to contempt proceedings and seek further legal recourse.

We request a response by 9 a.m. on Monday, May 6, 2019. Please do not hesitate to contact us if you have any questions.

Sincerely,



Jerrold Nadler  
Chairman

House Committee on the Judiciary

cc: The Hon. Doug Collins  
Ranking Member, House Committee on the Judiciary

# **EXHIBIT M**



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

May 7, 2019

The Honorable Jerrold Nadler  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
Washington, D.C. 20515

Dear Chairman Nadler:

As you know, the Attorney General has repeatedly sought to accommodate the interests of the House Committee on the Judiciary in the investigation conducted by Special Counsel Robert S. Mueller, III. On April 18, 2019, the Attorney General voluntarily disclosed to Congress the Special Counsel's report, which was intended to be "confidential" under the applicable regulations, with as few redactions as possible, consistent with the law and long-established confidentiality interests of the Executive Branch. He also made available to you and other congressional leaders a minimally redacted version of the report that excluded only grand-jury information, which could not lawfully be shared with Congress. In response, you refused even to review the minimally redacted report, and you immediately served a subpoena, dated April 18, 2019, demanding production of the fully unredacted report and the Special Counsel's entire investigative files, which consist of millions of pages of classified and unclassified documents, bearing upon more than two dozen criminal cases and investigations, many of which are ongoing.

Since then, the Department of Justice has offered further accommodations to the Committee. In particular, the Department offered to expand the number of staff members who may review the minimally redacted report; to allow Members of Congress who have reviewed the minimally redacted report to discuss the material freely among themselves; and to allow Members to take and retain their notes following their review. We expressed our hope that these further accommodations would prompt you and your colleagues actually to review the minimally redacted report, which would allow the parties to engage in meaningful discussions regarding possible further accommodations of the Committee's additional expansive requests. We further proposed a framework for those discussions, and made clear that we were open to conducting them on an expedited basis.

Unfortunately, the Committee has responded to our accommodation efforts by escalating its unreasonable demands and scheduling a committee vote to recommend that the Attorney General be held in contempt of Congress. In particular, the Committee has demanded that the Department authorize review of the minimally redacted report by all 41 members of the Committee, as well as all members of the House Permanent Select Committee on Intelligence,



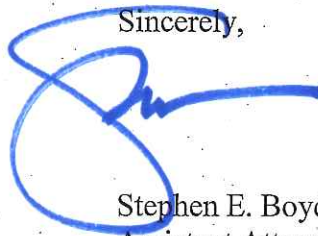
and additional staff members. As we have explained, however, doing so would force the Department to risk violating court orders and rules in multiple ongoing prosecutions, as well as risk the disclosure of information that could compromise ongoing investigations. In addition, you have demanded that the Department join in a request that a court grant the Committee access to grand-jury material protected by Federal Rule of Criminal Procedure 6(e), even though we have explained that such a request would force the Department to ignore existing law. Such unreasonable demands, together with the Committee's precipitous threat to hold the Attorney General in contempt, are a transparent attempt to short-circuit the constitutionally mandated accommodation process and provoke an unnecessary conflict between our respective branches of government. They are also counterproductive. They will not further the Committee's interests in obtaining the requested information.

In the face of the Committee's threatened contempt vote, the Attorney General will be compelled to request that the President invoke executive privilege with respect to the materials subject to the subpoena. I hereby request that the Committee hold the subpoena in abeyance and delay any vote on whether to recommend a citation of contempt for noncompliance with the subpoena, pending the President's determination of this question.

This request is consistent with long-standing policy of the Executive Branch about congressional requests for information implicating executive privilege. *See* President Ronald Reagan, Memorandum for the Heads of Executive Departments and Agencies, Procedures Governing Responses to Congressional Requests for Information 2 (Nov. 4, 1982) (directing executive agencies to "request the Congressional body to hold its request for the information in abeyance" in order to "protect the privilege pending a Presidential decision"). Regrettably, the Committee has made this request necessary by threatening to pretermitt the constitutionally mandated accommodation process between the branches and to hold a vote on contempt tomorrow morning.

This request is not itself an assertion of executive privilege. If the Committee decides to proceed in spite of this request, however, the Attorney General will advise the President to make a protective assertion of executive privilege over the subpoenaed material, which undoubtedly includes material covered by executive privilege. President Clinton, acting on the advice of Attorney General Janet Reno, made such a protective assertion of privilege in similar circumstances. *See Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 1 (1996). We remain open to further discussions with the Committee, and we hope that the Committee does not make it necessary for the President to take that step tomorrow.

Sincerely,



Stephen E. Boyd  
Assistant Attorney General

cc: The Honorable Doug Collins  
Ranking Member

# **EXHIBIT N**

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Permanent Select Committee  
on Intelligence  
U.S. House of Representatives

May 8, 2019

The Honorable William P. Barr  
Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Attorney General Barr:

After repeated, bipartisan overtures and multiple, unreciprocated efforts by the House Permanent Select Committee on Intelligence ("Committee") to reach a reasonable accommodation on its requests to the Department of Justice for documents and materials related to the Special Counsel's investigation, including foreign intelligence and counterintelligence information, the Committee has no choice but to serve the attached subpoena for those materials.

On March 27, 2019, Ranking Member Devin Nunes and I wrote on a bipartisan basis to request that all materials, regardless of form and classification, obtained or produced by the Special Counsel's Office during its investigation, be produced to the Committee starting on April 2. The Committee received no response from you or the Department.

On April 25, after four weeks without any response, Mr. Nunes and I again wrote on a bipartisan basis to reiterate the Committee's request. We affirmed that the Committee seeks the Department's cooperation in good faith, but underscored that absent the Department's meaningful compliance with the Committee's request by May 2, the Committee would have no choice but to resort to compulsory process. Our letter made clear that, for the Committee to discharge its unique constitutional and statutory responsibilities, the Committee requires full visibility into the Special Counsel's Office's unredacted report, findings, and underlying evidence and information. In particular, the Committee has an obligation to conduct necessary oversight to examine the foreign intelligence and counterintelligence information gathered by the Special Counsel's Office, assess the counterintelligence and national security implications, and consider whether legislation or other appropriate remedies are required in response.

Representatives from the Department's Office of Legislative Affairs ("OLA") finally agreed to meet with Committee staff on April 29 to discuss, for the first and only time and on a bipartisan basis, the Committee's outstanding request. Committee staff outlined in detail the



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Committee's request for documents and testimony and underscored the expectation that the Department would begin to meaningfully comply with the Committee's request by the deadline set out in our April 25 letter. On Monday, May 1, 2019, Committee staff reiterated by email to OLA that, absent substantial compliance with the Committee's request, the Committee would have no choice but to move towards compulsory process. Committee staff also requested that the Department advise the Committee whether it would begin to produce any documents and, if so, what schedule the Department anticipated following.

OLA did not respond until May 3 – after the Committee's May 2 document production deadline had already passed – and stated that the Department had already taken “meaningful steps” in responding to the Committee's April 25 letter. The Department cited to (1) its unilateral decision to allow only the Chairman and Ranking Member, along with one staff member each, to review a less-redacted version of the Special Counsel's report with onerous review restrictions – an offer that had already been rejected by the Committee on April 19 – and (2) a brief phone call the Committee staff held with the Federal Bureau of Investigation (FBI) regarding procedural matters unrelated to the substantive work of the Special Counsel's Office. Neither of these responses amounted to a good faith effort to negotiate an accommodation of the Committee's request.

That same day, Committee staff cautioned, again, that the Department's refusal to begin complying in any meaningful way with the Committee's actual document request would leave it no choice but to resort to compulsory process. Committee staff also underscored that the Department's onerous access restrictions for the less-redacted version of the report were unacceptable and did not constitute a reasonable accommodation. Committee staff further reminded the Department that it provided the Committee during the last Congress an expansive and voluminous production of classified and sensitive records pertaining to closed and ongoing investigations, including this very same investigation. In fact, on July 6, 2018, the Department informed our Committee that it had provided more than 880,000 pages of documents related to the FBI investigation into former Secretary of State Hillary Clinton's use of a private email server, as well thousands of pages of responsive documents related to the then-ongoing investigation into Russia's interference in the 2016 presidential election (see enclosed letter). These materials were of the precise type the Department now claims it is prohibited from giving to the full Committee, including classified and law enforcement sensitive information, documents related to third parties, and those pertaining to ongoing investigations.

Finally, Committee staff again communicated with the Department on May 7 as part of the Committee's continuing yet unreciprocated effort to reach a reasonable accommodation. Staff asked once again to meet with the Department to discuss a reasonable accommodation of the Committee's request. Committee staff emphasized yet again that the Committee had yet to receive a meaningful response or a single document from the Department and that, despite the Committee's best efforts to negotiate in good faith, the Department has repeatedly missed deadlines set by the Committee without explanation. For a final time, Committee staff reiterated that if the Committee did not receive meaningful compliance, the Committee would have no

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choice but to consider alternative courses of action, including compulsory process. This meeting request remains unfulfilled.

The Department's failure to engage and negotiate with the Committee, and its failure to comply in any meaningful way with the Committee's bipartisan document request, necessitates the issuance of the attached subpoena.

As outlined in the subpoena schedule, the Committee requests (1) the complete and unredacted version of the report submitted by Special Counsel Robert S. Mueller III; (2) all documents and materials, regardless of form and classification, referenced in the unredacted report; and (3) all documents and materials, regardless of form and classification, obtained or generated by the Special Counsel's Office in the course of its investigation referring or relating to (a) any foreign individuals or entities of any type, (b) any persons or entities associated with or acting in any capacity as a representative, agent, or proxy for any such foreign individuals or entities, (c) any communications, interactions, or links between or about U.S. persons and such foreign individuals or entities, and (d) any effort to influence, impede, or obstruct congressional investigations.

The attached subpoena schedule, moreover, makes clear that the Committee's demand includes material that contains or relates to grand jury information. Pursuant to the National Security Act and the Federal Rules of Criminal Procedure, the Committee is entitled as a matter of law to all foreign intelligence and counterintelligence information contained in the Special Counsel's report, as well as the underlying evidence and information obtained or generated by the Special Counsel's Office.<sup>1</sup> Rule 6(e) of the Federal Rules of Criminal Procedure, moreover, poses no bar to disclosure to the Committee of grand jury material involving foreign intelligence or counterintelligence.<sup>2</sup>

The fact that evidence and information may have been gathered during a criminal investigation, including through the grand jury process, and may be unclassified in no way diminishes its nature as foreign intelligence or counterintelligence information that must be

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<sup>1</sup> See 50 U.S.C. § 3092 (requiring, among other things, that the heads of all departments, agencies, or entities of the United States government involved in intelligence activities keep the congressional intelligence committees fully and currently informed of all intelligence activities, and to furnish to the congressional intelligence committees upon request any information or material concerning intelligence activities which is within the custody or control of the departments, agency, or entity of the United States government); *see also* 50 U.S.C. § 3003(1) (defining "intelligence" to include "foreign intelligence" and "counterintelligence").

<sup>2</sup> To the extent any such information relates to grand jury matters, Rule 6(e) of the Federal Rules of Criminal Procedure poses no bar to disclosure of such materials to the Committee. Under the exception set forth in Rule 6(e)(3)(D), the Department of Justice may disclose to the Committee "any grand-jury matter involving foreign intelligence, counterintelligence [], or foreign intelligence information," as well as any grand-jury matter involving "grave hostile acts of a foreign power," "a threat of domestic or international sabotage or terrorism," or "clandestine intelligence gathering activities by an intelligence service or network of a foreign power." Fed. R. Crim. P. 6(e)(3)(D).

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provided to the Committee.<sup>3</sup> This includes information regarding efforts by the Russian government or other foreign actors to contact or communicate with Americans. For example, overtures from the Russian government to a presidential campaign, such as the June 9, 2016, meeting at Trump Tower, were relevant to the Special Counsel's criminal investigation, but such outreach by foreign actors to Americans also constitutes important and relevant information for foreign intelligence and counterintelligence purposes. The Special Counsel's report is replete with similar information about contacts between Russian officials, agents, or proxies with U.S. persons, all of which involve foreign intelligence and counterintelligence equities, even if not classified.

For the reasons outlined above, the Committee's resort to compulsory process is necessary and due to the Department's failure to comply with the Committee's repeated requests. Consistent with Rule 10 of the Committee's Rules of Procedure for the 116<sup>th</sup> Congress, the Committee therefore commands by subpoena that the Department produce the documents identified in the attached subpoena schedule by 3 p.m. on **Wednesday, May 15, 2019**.

Please have the Department contact the Committee Majority Staff at (202) 225-7690 to coordinate the production.

Sincerely,



Adam B. Schiff  
Chairman

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<sup>3</sup> Counterintelligence information is defined as "information gathered ... to protect against espionage [and] other intelligence activities ... conducted by or on behalf of foreign governments ... foreign organizations, or foreign persons[.]" 50 U.S.C. § 3003(3). Foreign intelligence information is defined as is "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons [...]" 50 U.S.C. § 3003(2).

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Enclosures:

1. *Subpoena, Schedule A, Instructions and Definitions, and Committee Rules of Procedure*
2. *Letter from Chairman Adam B. Schiff and Ranking Member Devin Nunes to Attorney General William P. Barr, Deputy Attorney General Rod J. Rosenstein, Director Christopher Wray (March 27, 2019)*
3. *Letter from Chairman Adam B. Schiff and Ranking Member Devin Nunes to Attorney General William P. Barr, Deputy Attorney General Rod J. Rosenstein, Director Christopher Wray (April 25, 2019)*
4. *Letter from Assistant Attorney General Stephen E. Boyd to the House Judiciary Committee and House Permanent Select Committee on Intelligence (July 6, 2018)*

# EXHIBIT O



**U.S. House of Representatives**  
**Committee on the Judiciary**

Washington, DC 20515-6216  
One Hundred Sixteenth Congress

May 24, 2019

The Honorable William P. Barr  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Mr. Pat Cipollone  
Counsel to the President  
The White House  
1600 Pennsylvania Ave, N.W.  
Washington, D.C. 20002

Dear Attorney General Barr and Mr. Cipollone:

I write to follow up on my letters of May 10, 2019 to Attorney General Barr and May 16, 2019 to Mr. Cipollone describing the efforts to date by the Judiciary Committee to reach a reasonable accommodation regarding the Committee's April 18, 2019 subpoena, and expressing the Committee's willingness to engage in further negotiations to resolve this dispute. I also proposed in both letters that the Committee's staff meet with your staffs to determine if a reasonable accommodation could be reached. As you know, I've received no response to my letters and the Committee's offer to engage in further accommodation discussions.

We write yet again in an effort to encourage both the Department of Justice and the White House to engage in accommodation discussions to see if an agreement can be reached before the House takes action on the floor and prior to the Committee making any decisions regarding potential litigation. To facilitate such discussions, the Committee is providing further details regarding the documents and information that it is willing to accept as satisfaction of its subpoena in a final attempt to avoid the need for subpoena enforcement litigation.

To that end and as we previously offered, the Committee is prepared to identify specific materials that if produced would be deemed to satisfy the subpoena. These are documents referenced in Volume II of the Special Counsel's report that primarily consist of (i) FBI interview reports (commonly known as "302s") describing statements given by firsthand witnesses to relevant events, (ii) a limited set of notes taken by witnesses and relied on by the

Special Counsel's office, and (iii) a small number of White House memoranda and communications specifically cited in the report.<sup>1</sup>

A complete list of the specific documents is attached. Within that limited universe of documents, we are further prepared to prioritize production of materials that would provide the Committee with the most insight into certain incidents where the Special Counsel found "substantial evidence" of obstruction of justice. Those incidents include (1) President Trump's efforts to have Special Counsel Mueller removed; (2) President Trump's efforts to have White House Counsel Don McGahn create a fraudulent record denying that incident; and (3) President Trump's efforts to have Attorney General Sessions reverse his recusal and limit the scope of the Special Counsel's investigation. Mr. McGahn's statements to the Special Counsel's office, for example, are cited more than 70 times in descriptions of incidents (1) and (2) and, therefore, are of particular importance to the Committee's work.

In addition, as to redacted portions of the report that are not subject to Federal Rule of Criminal Procedure 6(e), the Committee is prepared to limit its review to members of the Judiciary Committee and appropriate staff, subject to the condition that the Department has insisted on – that they cannot discuss what they have seen with anyone else (except that the Committee has requested the ability for counsel to share the materials with a court under seal in the event of litigation). As you know, Congress has ample means of providing for safe storage of these materials, as it is routinely entrusted with the responsibility to protect classified and other sensitive information. Although the Department's proposed conditions are a departure from accommodations made by previous Attorneys General of both parties (as is our proposed compromise), the Committee is nevertheless prepared to accept this modified requirement as a concession.

Lastly, as we have previously made clear, the Committee is not seeking from the Department any information or documents that are properly subject to Rule 6(e).<sup>2</sup> Similarly, the Committee is also prepared to relieve the Department of the obligation to produce the underlying documents not specifically identified in the Mueller Report and contained in the limited set of Volume II referenced documents listed in the attachment, if an agreement can be reached.

As a result of the Committee's unilateral accommodation efforts, the Department would satisfy the Committee's subpoena by producing the limited set of materials from Volume II of the Mueller Report that the Committee has identified, and permitting only the Judiciary Committee members and appropriate staff to review the non-Rule 6(e) redactions under the conditions the Department has requested.

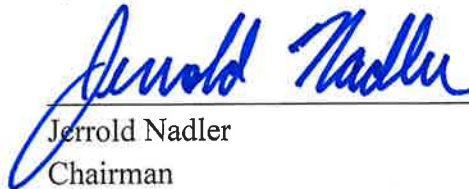
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<sup>1</sup> The Committee is prepared to discuss whether any redactions of these documents would be appropriate.

<sup>2</sup> The Committee intends to seek a court order permitting the Committee to receive those portions of the report redacted on Rule 6(e) grounds and potentially related referenced documents.

Notwithstanding the President's stated intent to block all congressional subpoenas, the Committee also remains prepared to meet with the Department and the White House to ascertain if an acceptable accommodation can be reached. I am personally willing to meet with you both in an effort to achieve a suitable compromise.

Sincerely,



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Jerrold Nadler  
Chairman  
House Committee on the Judiciary

cc: Doug Collins  
Ranking Member

**Documents Referenced in Volume II of the Special Counsel's Report**

**FBI Interview Reports (302s)**

The Committee requests 302 reports for the following individuals, identified by the following dates:

- Stephen K. Bannon (2/12/18; 2/14/18; 10/26/18; 1/18/19)
- Dana Boente (1/31/18)
- James Burnham (11/3/17)
- Chris Christie (2/13/19)
- Michael Cohen (8/7/18; 9/12/18; 10/17/18; 11/12/18; 11/20/18; 3/19/19)
- James Comey (11/15/17)
- Rick Dearborn (6/20/18)
- Uttam Dhillon (11/21/17)
- Annie Donaldson (11/6/17; 4/2/18)
- John Eisenberg (11/29/17)
- Michael Flynn (11/17/17; 11/20/17; 11/21/17; 1/19/18)
- Counsel to Michael Flynn (name not specified) (3/1/18)
- Rick Gates (4/10/18; 4/11/18; 4/18/18; 10/25/18)
- Hope Hicks (12/7/17; 12/8/17; 3/13/18)
- Joseph Hunt (2/1/18)
- John Kelly (8/2/18)
- Jared Kushner (4/11/18)
- Corey Lewandowski (4/6/18)
- Paul Manafort (10/1/18)
- Andrew McCabe (8/17/17; 9/26/17)
- Mary McCord (7/17/17)
- K.T. McFarland (12/22/17)
- Don McGahn (11/30/17; 12/12/17; 12/14/17; 3/8/18; 2/28/19)
- Stephen Miller (10/31/17)
- Rob Porter (4/13/18; 5/8/18)
- Reince Priebus (10/13/17; 1/18/18; 4/3/18)
- Rod Rosenstein (5/23/17)
- Christopher Ruddy (6/6/18)
- James Rybicki (6/9/17; 6/13/17; 6/22/17; 11/21/18)
- Sarah Sanders (7/3/18)
- Jeff Sessions (1/17/18)
- Sean Spicer (10/16/17)
- Sally Yates (8/15/17)

### **Contemporaneous Notes**

The Committee requests notes taken by the following individuals on the following dates:

- Annie Donaldson (3/2/17; 3/5/17; 3/6/17; 3/12/17; 3/16/17; 3/21/17; 4/11/17; 5/9/17; 5/10/17; 5/31/17)
- Joseph Hunt (5/3/17; 5/8/17; 5/9/17; 5/17/17; 5/18/17; 5/30/17; 7/21/17)
- John Kelly (2/5/18; 2/6/18)
- Corey Lewandowski (6/19/17)
- Stephen Miller (5/5/17)
- Rob Porter (7/10/17; 10/16/17; 12/6/17; 1/27/18; undated notes identified as "SC\_RRP000053")
- Reince Priebus (7/22/17)

### **Memoranda and Communications**

The Committee requests the following memoranda and communications. Dates and Bates numbers referenced in the Special Counsel's report are included where available, but Bates numbers may not encompass the entirety of the page ranges for each document:

- Draft Memorandum to file from Office of Counsel to the President (2/15/17) (SCR15\_000198 - SCR15\_000202)
- Draft Termination Letter to FBI Director Comey (SCR013c\_000003 - SCR013c\_000006)
- E-mail from James Burnham to Annie Donaldson (2/16/17) (SCR004\_00600)
- McFarland Memorandum for the Record (2/26/17) (KTMF\_00000047 - KTMF\_00000048)
- White House Counsel's Office Memorandum (SCR016\_000002 - SCR016\_000005)
- White House Counsel's Office Memorandum re: "Flynn Tick Tock" (SCR015\_000278)

# **EXHIBIT P**

FILED UNDER SEAL W/ X  
 CHRISTOFFERSON, 3/5/74 -  
 NOT SERVED UPON DEFENSE  
 COUNSEL - PHR

UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF COLUMBIA

IN RE REPORT AND RECOMMENDA- :  
 TION OF JUNE 5, 1972 GRAND :  
 JURY CONCERNING TRANSMISSION :  
 OF EVIDENCE TO THE HOUSE OF :  
 REPRESENTATIVES :  
 :

Misc. No.

MEMORANDUM FOR THE UNITED STATES  
 ON BEHALF OF THE GRAND JURY

On March 1, 1974, the June 5, 1972 Grand Jury returned an indictment charging seven persons with various criminal offenses in the so-called Watergate affair. United States v. Mitchell, et al., Crim. No. 74-110. At the same time the Grand Jury submitted to the Court, under seal, a Report and Recommendation that stated that it had heard evidence relating to the impeachment inquiry currently being conducted by the Committee on the Judiciary of the House of Representatives, and that it had concluded that it should presently defer to the House and allow the House to determine what action may be warranted by this evidence at this time. The Grand Jury then recommended strongly and unanimously that the evidence referred to, and contemporaneously submitted to the Court, should be transmitted forthwith to the House Judiciary Committee, with the further recommendation that the Committee be informed of the Grand Jury's belief that the evidence should be utilized with due regard for avoiding any unnecessary interference with the Court's ability to conduct fair trials of persons under indictment.

Counsel for certain defendants in the case of United States v. Mitchell, et al. have sought to challenge the

Court's power to honor the Grand Jury's recommendation. As counsel for the United States and the Grand Jury, we submit this memorandum in support of that recommendation. We shall show that regular grand juries of the federal courts have inherent power to make reports and recommendations of this type, that the Court has the right to honor the recommendation in the present matter, and that it is clearly in the overall public interest to do so. Counsel for defendants in United States v. Mitchell, et al. have not demonstrated such a compelling interest in these present proceedings to warrant acceding to their request for suppression of the Grand Jury's report and disregard of its recommendation.

#### I. THE ROLE OF THE GRAND JURY

As this Court and the Court of Appeals recognized in enforcing the Grand Jury's subpoena for Presidential tapes and documents, the grand jury is a unique institution in our constitutional system, with great responsibilities and commensurate powers, even in matters directly affecting the President. In assessing the right of the Grand Jury in the Watergate investigation to make a report to the Court in addition to the indictment it has returned, it is important to bear in mind that the grand jury's "constitutional prerogatives are rooted in long centuries of Anglo-American history" and that the grand jury holds a "high place . . . as an instrument of justice." Branzburg v. Hayes, 408 U.S. 665, 687 (1972).

The grand jury owes its fundamental role in the criminal justice process to its adoption by the Fifth Amendment as the basic mechanism for determining whether to charge a person with a serious federal crime. Even though it is generally



considered an adjunct of the Judicial Branch, the grand jury's constitutional status gives it an independence -- with authority derived from the people -- similar to its traditional role at common law. Thus, the grand jury can act on its own initiative, without submissions from the prosecutor,<sup>1/</sup> and "it may make presentments of its own knowledge without any instruction or authority from the court."<sup>2/</sup> As the Supreme Court held in reversing the dismissal of an indictment that had been returned by a second grand jury without securing prior leave of court, "the power and duty of the grand jury to investigate is original and complete . . . and is not therefore dependent for its exertion upon the approval or disapproval of the court. . . ."<sup>3/</sup>

The grand jury, composed of laymen randomly selected, serves as the "conscience of the community." It may elect not to charge a crime, even if probable cause has been demonstrated, and this decision is "not subject to review by any other body"; of course, its "sweeping powers" over the terms of any charges it does return "entail very strict limitation upon the power of the prosecutor or court to change the indictment found by the jurors." Gaither v. United States, 413 F.2d 1061, 1066 (D.C. Cir. 1969).

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<sup>1/</sup> See generally Hale v. Henkel, 201 U.S. 43, 59-66 (1906). United States v. Cox, 342 F.2d 167, 186-189 (5th Cir.) (Wisdom, J., concurring), cert. denied, 381 U.S. 935 (1965).

<sup>2/</sup> In re April 1956 Term Grand Jury, 239 F.2d 263, 268 (7th Cir. 1956). See also, In re Dymo Industries, Inc., 300 F. Supp. 532, 533 (N.D. Calif.), aff'd on opinion below, 418 F.2d 500 (9th Cir. 1969), cert. denied, 397 U.S. 937 (1970).

<sup>3/</sup> United States v. Thompson, 251 U.S. 407, 413 (1920). Despite its "supervisory power" over the grand jurors, the court "cannot limit them in their legitimate investigation of alleged violations of law." Application of Texas Co., 27 F. Supp. 847, 850 (E.D. Ill. 1939). Accord, Blair v. United States, 250 U.S. 273, 282 (1919); Bursey v. United States, 466 F.2d 1059, 1071, 1075 (9th Cir. 1972).

One of the important collateral consequences of the grand jury's independence is its right to insist that the prosecuting attorney prepare the charges it believes are warranted.<sup>4/</sup> Chief Judge Fee, in his exhaustive and frequently quoted discussion of the grand jury, summarized the independence of the grand jury in these words:

Unquestionably, the grand jury are under no necessity to follow the orders of the prosecutor. They can present an indictment whether he will or no. Indeed, they may make a presentment contrary to the direct orders of a judge, the prosecutor for the King or the Chief Executive. <sup>5/</sup>

Because of this independent status, a grand jury is even entitled to return, in open court, a draft indictment the United States Attorney refuses to sign. In short, the grand jury has the right to report to the court its decision about what is proper and to do so publicly, at least in the absence of the likelihood of irreparable injury to innocent persons.<sup>6/</sup>

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<sup>4/</sup> The leading case in this area is United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965), where four of seven judges of the court of appeals en banc held that the court can order the United States Attorney to assist the grand jury by drafting "forms of indictment in accordance with its desires" (342 F.2d at 181, 182), but a different 4-3 combination ruled that the prosecutor cannot be compelled to give the concurrence of the Executive Branch, which they concluded is necessary to initiate an actual prosecution (342 F.2d at 171-172, 182).

The District of Columbia Circuit recognized the same principle in Gaither v. United States, supra, 413 F.2d at 1069. Chief Judge Roszel Thomsen of the District of Maryland also reached this conclusion in his thorough opinion. See In re Presentment of Special Grand Jury, January 1969, 315 F. Supp. 662, 674 (1970).

<sup>5/</sup> United States v. Smyth, 104 F. Supp. 283, 294 (N.D. Calif. 1952) (footnotes omitted); In re Miller, 17 Fed. Cas. (No. 9,552) (C.C.D. Ind. 1878).

<sup>6/</sup> See Rule 6(f), Federal Rules of Criminal Procedure: "The indictment shall be returned by the grand jury to a judge in open court." Under Rule 6(e), the court has power to direct that an indictment "shall be kept secret until the defendant is in custody." The rules do not provide any other grounds for sealing the proposed charge.  
(Footnote continued on next page)

II. THE GRAND JURY'S POWER TO  
RETURN A REPORT

The foregoing discussion suggests one source of the grand jury's power to submit a report that does not constitute a formal indictment because, for example, the prosecuting attorney refuses to sign it and give it prosecutive effect.

The Court of Appeals for this Circuit in its decisive ruling on grand jury procedure has expressly recognized the power of a federal grand jury to make a "presentment" that does not constitute an indictment:

Even today the grand jury may investigate, call witnesses and make a presentment charging a crime. However, the presentment, even if otherwise an adequate charge, cannot serve as an indictment and hence initiate a prosecution under the Federal Rules [of Criminal Procedure] until approved by a United States Attorney. Gaither v. United States, 413 F.2d 1061, 1069 n.19 (1969) (emphasis added).

Thus, there is no reason for concluding that a federal grand jury is limited, as counsel for defendants Haldeman and Ehrlichman in United States v. Mitchell et al. contend, to the options either to "indict or ignore."

The weight of modern authorities, moreover, shows that federal grand juries have the power to formulate and submit other kinds of reports as well, even if the grand jury is not proposing the indictment of any particular individual.

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(continuation of footnote 6)

See generally, In re Presentment of Special Grand Jury, January 1969, supra, 315 F. Supp. at 667, 676-677, where a circuit judge initially ordered Judge Thomsen to consider these novel questions in camera but after review of the legal issues, Judge Thomsen ruled, relying on United States v. Cox, supra, that the proposed indictment is to be returned in open court.

As Judge Thomsen of the District Court for the District of Maryland recently concluded:

The common law powers of a grand jury clearly include the power to make presentments, sometimes called reports, calling attention to certain actions of public officials, whether or not they amounted to a crime. 7/

That common law power to submit reports is preserved by the grand jury's constitutional status. The Supreme Court's landmark decision on the attributes of the grand jury, Hale v. Henkel, supra, specifically refers to the source of this power:

Indeed, the oath administered to the foreman, which has come down to us from the most ancient times, and is found in Shaftesbury's Trial, 8 How. St. Tr. 769, indicates that the grand jury was competent to act solely on its own volition. This oath was that "you shall diligently inquire and true presentments make of all such matters, articles, and things as shall be given you in charge, as of all other matters, articles, and things as shall come to your own knowledge touching this present service," etc. 201 U.S. at 60. (emphasis added) 8/

Thus Judge Brown observed, without challenge from the other judges sitting on the en banc Fifth Circuit in Cox, supra:

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7/ In re Presentment of Special Grand Jury, January 1969, supra, 315 F. Supp. at 675. See generally, Kuh, The Grand Jury "Presentment": Foul Blow or Fair Play?, 55 Colum. L. Rev. 1103 (1955); Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590 (1961), which discuss the origins of the grand jury's common law power to make reports.

8/ After the dismissal of Special Prosecutor Cox, this Court promptly summoned the Watergate Grand Jury and the Additional August 1973 Grand Jury, which had been specially empanelled at the Special Prosecutor's request, and in open court instructed them "to fully and strictly adhere" to the traditional oath they had taken. The Court quoted the oath in full, including the pledge to make "true presentment" of all offenses and not to leave "anyone unrepresented from fear, favor, affection, reward, or hope of reward." See Statement of Chief Judge Sirica to Members of Grand Juries, October 23, 1973.



To me the thing seems this simple:  
the Grand Jury is charged to report.  
It determines what it is to report.  
It determines the form in which it  
reports. 9/

The Fifth Circuit recently confronted this issue again, and while it found it unnecessary to pass squarely on the matter, the court cited and discussed the "persuasive authority and considerable historical data to support a holding that federal grand juries have authority to issue reports which do not indict for crime, in addition to their authority to indict and to return a no true bill." In re Grand Jury Proceedings, 479 F.2d 458, 460 (5th Cir. 1973).

It is true, of course, that on a few occasions some questions have been raised about the existence and scope of this power of the federal grand jury. <sup>10/</sup> The federal case generally cited against this power is Judge Weinfeld's opinion in Application of United Electrical Radio & Machine Workers, 111 F. Supp. 858 (S.D.N.Y. 1953). <sup>11/</sup> That case involved unusual

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<sup>9/</sup> 342 F.2d at 184. See also 342 F.2d at 180 (opinion of Rives, Gewin & Bell, JJ.), and 342 F.2d at 189 (opinion of Wisdom, J.): "No one questions the jury's plenary power to inquire, to summon witnesses, and to present either findings and a report or an accusation in open court by presentment."

<sup>10/</sup> Such doubts are expressed in Orfield, The Federal Grand Jury, 22 F.R.D. 343, 402, 446-447 (1959) and Senate Report 91-617, 91st Cong., 1st Sess. at 47 (1970), on the Organized Crime Control Act of 1970.

<sup>11/</sup> Counsel for defendants Haldeman and Ehrlichman also cite the decision in Poston v. Washington, Alexandria & Mt. Vernon R.R., 36 App. D.C. 359 (1911), as establishing that, "according to the law and practice in the District of Columbia" a regular federal grand jury "has no power other than to indict or ignore." That case establishes no such rule, however. What was at issue there was the question whether the railroad company, in an action against it for allegedly causing a state grand jury of the Alexandria county circuit court to issue a libelous report, could defend on the ground the report was covered by a privilege for judicial immunity. The court of appeals held that the report was not covered by a judicial privilege because it was not a kind of presentment permitted by "the practice in the State of Virginia." 36 App. D. C. at 369.

facts -- a grand jury's recommendations to the National Labor Relations Board about the sufficiency of the "non-communist" party membership affidavits submitted to the Board. The twin grounds for decision were that those recommendations overstepped the "judicial function" under the separation of powers and violated the obligation of secrecy imposed by Rule 6(e). 111 F. Supp. at 863-866. Both reasons are circular. The grand jury derives its authority from the people under the Constitution, and as an institution has always exercised the function of making recommendations on matters of public concern. In addition, there is no reason to believe that Rule 6(e) was intended to cut off an historically proper function of the grand jury. For these reasons and others, later federal decisions discussed in this memorandum have refused to follow Judge Weinfeld's decision there.

Nor is there any reason to infer that Congress has stripped regular federal grand juries of their historic -- although infrequently exercised -- power to submit reports. The argument to this effect is based on the enactment in the Organized Crime Control Act of 1970 of explicit procedures by which a newly created institution -- a "special grand jury" -- can prepare and file a report dealing with public corruption or organized crime conditions. See 18 U.S.C. §3333. The Senate report on that bill, S. Rep. 91-617, supra, p. 47, did take note of Judge Weinfeld's decision and conclude that explicit statutory authority would be necessary to confer such power; the Committee was apparently unaware, however, of the intervening decisions like In re Petition for Disclosure of Evidence Before October 1959 Grand Jury, 184 F. Supp. 38 (E.D. Va. 1960), and United States v. Cox, supra, 342 F.2d 167, which uphold such power. Certainly there is not a word in the

legislative history of the 1970 Act suggesting that Congress intended to restrict the power of regular grand juries if, as we contend and as later cases have held, Judge Weinfeld's decision was wrong.<sup>12/</sup>

With the exception of that decision, federal decisions reflect a number of different types of grand jury reports that have been found permissible. One type is the draft indictment, or "presentment", that accuses named individuals of criminal misbehavior but does not actually constitute a valid indictment in the face of the prosecuting attorney's refusal to sign it.<sup>13/</sup> A second is a report analyzing local conditions and making recommendations about law enforcement policy.<sup>14/</sup> Third, and most pertinently here, is a report that discloses to the court that the grand jury has heard evidence that it believes is material to legal proceedings within the jurisdiction of another agency and recommends that the court exercise its inherent power, as codified in Rule 6(e), to submit the evidence to the appropriate officials.<sup>15/</sup>

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<sup>12/</sup> Indeed, Judge Weinfeld himself recognized that in the sixteen years prior to his 1953 decision, regular federal grand juries in the Southern District of New York had filed at least fourteen reports "without challenge." Application of United Electrical, Radio & Machine Workers, supra, 111 F. Supp. at 869.

<sup>13/</sup> See e.g., United States v. Cox, supra, 342 F.2d 167; In re Presentment of Special Grand Jury, January 1969, 315 F. Supp. 662.

<sup>14/</sup> See e.g., In re Grand Jury Proceedings, supra, 479 F.2d 458.

<sup>15/</sup> See, e.g., In re Petition for Disclosure of Evidence Before October 1959 Grand Jury, 184 F. Supp. 38, 40 (E.D. Va. 1960).

III. THIS COURT SHOULD HONOR THE  
RECOMMENDATION OF THE GRAND  
JURY

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Even though the grand jury is empanelled by the court, relies on the coercive process of the court, and submits its indictments or reports to the court,<sup>16/</sup> the grand jury's independent constitutional status necessarily implies that the court cannot generally superintend the grand jury in the exercise of its lawful discretion or refuse to give full credit to its decision.<sup>17/</sup>

Speaking of the "stubborn tenacity" of the grand jury that has developed to complement the independence of the judge,<sup>18/</sup> Chief Judge Fee explained:

While the court may exercise an influence over the proceedings, there is neither a method whereby an indictment by a grand jury can be peremptorily required, nor, on the other hand, is there any method of preventing the presentment of an indictment except by summary discharge.<sup>19/</sup>

Once the grand jury has submitted a report or presentment to the court, as here, the court does have the power to expunge it, in whole or in part, to the extent it is found illegal or unwarranted.<sup>20/</sup> But under the standards that have been developed, there is no justification for rejecting the Report and Recommendation of the Grand Jury in the present case.

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<sup>16/</sup> See generally, Rule 6, Federal Rules of Criminal Procedure, 18 U.S.C. §§ 3321, 3331-3334.

<sup>17/</sup> See, e.g., *Ex parte United States*, 287 U.S. 241, 249 (1932); *In re Texas Co.*, 201 F.2d 177, 180 (D.C. Cir.), cert. denied, 344 U.S. 904 (1952).

<sup>18/</sup> *United States v. Smyth*, *supra*, 104 F. Supp. at 293.

<sup>19/</sup> *Id.* at 292 (footnote omitted).

<sup>20/</sup> See generally, Orfield, *supra*, 22 F.R.D. at 446-447.



Judge Thomsen recently formulated the proper inquiry the court should make when confronted with the question of possible suppression of a grand jury report:

The Court is the agency which must weigh in each case the various interests involved, including the right of the public to know and the rights of the persons mentioned in the presentment, whether they are charged or not. The Court should regulate the amount of disclosure, to be sure that it is no greater than is required by the public "interest in knowing" when weighed against the rights of the persons mentioned in the presentment. In re Presentment of Special Grand Jury, January 1969, supra, 315 F. Supp. at 678.

In that case a federal grand jury in Baltimore had been investigating possible corruption in connection with federal construction contracts, and returned a number of indictments. The grand jury foreman then appeared in open court to read a "presentment" that described the course of the extensive investigation; the presentment also stated that the grand jury was prepared to return further indictments against additional defendants, that the United States Attorney was prepared to concur in signing the indictments, but had been directed by the Attorney General not to do so. The foreman delivered the proposed indictments to the court under seal. The court solicited the views of the Department of Justice and specially appointed amicus curiae on whether the "presentment" should be kept secret. In the interim, several persons claiming they believed they were named in the proposed indictments appeared anonymously through counsel and moved for suppression and expungement of the "presentment" and the proposed indictments. After considering all the positions, the court concluded:

It is not necessary in this case to attempt to lay down a rule which should apply in all situations. Each case should be decided on its own facts and circumstances. Here, there has been much discussion and disclosure in the communications media, some true, and some not true,

particularly during the last few days. The people who have been investigated have been disclosed, and there have been rumors in the press naming persons who it does not appear have even been investigated. Under these circumstances, the Court concludes that the substance of the charges in the indictment should be disclosed, omitting certain portions as to which the Court, in the exercise of its discretion, concludes that the public interest in disclosure is outweighed by the private prejudice to the persons involved, none of whom are charged with any crime in the proposed indictment. 315 F. Supp. at 678-679.

The court thereupon filed a summary of the proposed indictment ("presentment"), including the names of the proposed defendants and the allegations against them, and also including the names of the federal officials (Sen. Russell Long, Rep. Hale Boggs, and the Architect of the Capitol) who were the intended bribe recipients but who were not charged with actually receiving any money.

In the present case, the test points inevitably toward honoring the grand jury's recommendation. The Report and Recommendation deals exclusively with evidence concerning the President, not any of the defendants in United States v. Mitchell, et al. Furthermore, the identities of the other people investigated have been discussed at length in the course of public proceedings before the United States Senate and elsewhere. To the extent that any defendants in criminal proceedings are involved indirectly, they are already the subject of the Grand Jury's formal accusation and will have an opportunity to litigate their guilt or innocence on the charges at the trial of the pending indictment.

The "public interest" in granting the Grand Jury's recommendation is paramount here. After receiving a great volume of evidence concerning the President of the United States, the Grand Jury has decided at this time to defer to the House

of Representatives and has recommended that this material be furnished to the House in order that it may discharge its primary responsibility under the Constitution on this question of the gravest national concern.

The very recent decision of the Fifth Circuit in In re Grand Jury Proceedings, 479 F.2d 458 (1973), also supports the Grand Jury's action here. In that case a federal grand jury had investigated the circumstances surrounding dismissal of state narcotics charges because of the possibility that there was a conspiracy to discredit a federal agent who had testified in the case and had given testimony before the grand jury that led to several indictments. The grand jury found no criminal violations, but filed a report commenting on the extent of the local narcotics problem, urging the local district attorney to prepare his case and his witnesses better, and criticizing the state judge for prematurely dismissing the case. The district court had accepted the grand jury's request that the report be filed as a public record. Upon the denial of the state judge's motion to expunge the report, the court of appeals reversed in part. After citing the persuasive authority for the grand jury's power to file reports and after noting some of the factors that the courts have traditionally considered in deciding whether to expunge some or all of a grand jury report, the appellate court ordered deleted those portions of the report that referred specifically to local officials because, under the circumstances, that criticism served no legitimate federal interest. Among the factors listed as pertinent to the decision of any court faced with this question were: whether the report describes general community conditions or identifiable individuals; whether the individuals are public officials or only private citizens; whether the public interest in the

contents of the report outweighs any harm to named individuals; whether the conduct described is indictable; and whether there are other remedies available to the persons involved. 479 F.2d at 460 n.2. Here, of course, the Report and Recommendation, together with the underlying material, focus on the President, and are designed to enable the House to conduct a full and fair inquiry. Other persons are involved only indirectly. Those persons who are not under indictment have already been the subject of considerable public testimony and will no doubt be involved in further testimony, quite apart from the Grand Jury's Report and Recommendation. And those persons who are under indictment have a clear remedy open to challenge any incidental references to them -- in their trials.

Finally, similar issues arose in a related context when a federal grand jury in the Eastern District of Virginia submitted an oral and a written statement to the court recommending that the court transmit to city and state officials some of the evidence the grand jury had heard.<sup>21/</sup> Sparked by that recommendation, the State Attorney General and the local district attorney applied for disclosure of the evidence. The United States opposed the release of the evidence until related indictments returned by the grand jury could be tried. Chief Judge Bryan termed the grand jury's suggestion of referral of the evidence to local authorities "wholly proper," but commented that the report should have been confined to a simple recommendation to that effect, without contemporaneous disclosure of "the tenor or purport of the evidence before them" or of "the implications

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<sup>21/</sup> In re Petition for Disclosure of Evidence Before the October 1959 Grand Jury, supra, 184 F. Supp. 38.

the jurors drew from this evidence."<sup>22/</sup> (The Grand Jury in the present matter, of course, has scrupulously followed that caveat.) Judge Bryan ruled that the normal strictures of grand jury secrecy are relaxed "whenever the public interest would be better served by delivering up the grand jury evidence." Since the local prosecutor had shown a legitimate need for the evidence in discharging his official responsibilities to investigate and prosecute criminal offenses, the court granted the application.<sup>23/</sup> The court ordered the United States Attorney to make the testimony available, through the clerk of the court, for the local prosecutor to review it. The court also urged the local prosecutor to keep the information confidential "as far as practicable" and also acceded to the United States Attorney's request that the access await the disposition of the pending federal charges. 184 F. Supp. at 41.

We have already discussed the reasons why the "public interest" in the present matter would undoubtedly be served by "delivering up the grand jury evidence" to the House of Representatives with the appropriate request that it be used in a way to minimize any impact on criminal trials. In making its Report and Recommendation, the Grand Jury was respecting the tradition of the House of Representatives which recognizes as an authoritative precedent the action of a county grand jury in returning a presentment specifying charges against a federal territorial judge which were duly transmitted to the House for its consideration of possible impeachment of that official.

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<sup>22/</sup> 184 F. Supp. at 40.

<sup>23/</sup> The court ruled that the provision of Rule 6(e), authorizing disclosure "preliminarily to or in connection with a judicial proceeding," is not confined to proceedings in federal courts. 184 F. Supp. at 41.



3 Hinds' Precedents of the House of Representatives §2488 at 985 (1907).<sup>24/</sup>

Nothing in the ordinary principle of grand jury secrecy codified in Rule 6(e) of the Federal Rules of Criminal Procedure stands in the way of granting the Grand Jury's recommendation. The Rule leaves the Court with discretion to lift this secrecy when a sufficiently strong showing of need is made. See, e.g., United States v. Proctor & Gamble Co., 356 U.S. 677 (1958); Allen v. United States, 390 F.2d 476 (D.C. Cir. 1968). The "need" for the House to be able to make its profoundly important judgment on the basis of all available information is as compelling as any that could be conceived.

Furthermore, the provision of Rule 6(e) that the Court may permit disclosure of grand jury proceedings "preliminarily to or in connection with a judicial proceeding" establishes no obstacle. It would be fatuous to contend that Rule 6(e) relegates the need of a Presidential impeachment inquiry to a lower priority than, for example, that of a civil antitrust inquiry. In any event, the term "preliminarily to . . . a judicial proceeding" has been construed flexibly. See, e.g., Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958); Jochimowski v. Conlisk, \_\_\_ F.2d \_\_\_ (7th Cir. December 27, 1973) (14 Crim. L. Rep. 2391), authorizing disclosure of grand jury evidence to a state bar grievance committee and to a police disciplinary investigation, respectively. The function

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<sup>24/</sup> That matter arose in 1811, shortly after the adoption of the Constitution. The House appointed a select committee to investigate the grand jury's charges, and the committee found that they were not supported by the evidence.

Jefferson's Manual of Parliamentary Practice states that impeachment may be set "in motion" "by charges transmitted from a grand jury." Deschler, Constitution, Jefferson's Manual, and Rules of the House of Representatives, H. R. Doc. No. 384, 92d Cong., 2d Sess., §603 at 296.

of the House of Representatives in a Presidential impeachment inquiry, in deciding whether to prefer charges for "treason, bribery, or other high crimes and misdemeanors," is akin to that of a grand jury. Impeachment also results in a judicial trial before the Senate sitting as a Court of Impeachment with the Chief Justice of the United States presiding.

The final point to be considered is the objection of some defendants in United States v. Mitchell, et al. that transmittal of grand jury materials to the House would prejudice them and, therefore, that the Grand Jury's Report and Recommendation should be suppressed.

In asserting their "legal" interest in interposing this objection, defendants rely on Judge Weinfeld's decision in Application of United Electrical, Radio & Machine Workers, supra, and on the decision in Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio), aff'd on opinion below, 450 F.2d 480, 482 (6th Cir. 1971). Each of those cases, however, involves a grand jury report lodging formal accusations against the individuals objecting to the report. The case before this Court is far different. The Grand Jury Report and Recommendation submitted to the Court does not even refer to the defendants in United States v. Mitchell, et al., much less formally accuse them of misconduct or wrongdoing. Indeed, as the Report indicates, its object is merely to bring to the Court's attention that the Grand Jury has evidence that has a material bearing on the matters now before the House of Representatives Committee on the Judiciary and to recommend that this evidence be transmitted to that Committee. Any reference to defendants stems solely from the evidence accompanying the Report and is wholly incidental to its objective. Defendants are in no sense the "targets" of the Report.

Nor can they invoke the objection in Application of United Electrical, Radio & Machine Workers, that they are being deprived "of the right to defend themselves and to have their day in a Court of Justice." 111 F. Supp. at 861. Defendants are the subjects of an indictment resulting from the same Grand Jury investigation underlying the Report and Recommendation, and it must be presumed that they will receive a fair and speedy trial in accordance with the Fifth and Sixth Amendments, the Federal Rules of Criminal Procedure, and the Rules of this Court. In short, the concerns expressed by Judge Weinfeld are inapplicable here -- defendants will have their day in court and the opportunity to answer all charges against them.

The decision in Hammond also does not support the claim for relief here. In that case, a federal court in a civil rights action under 42 U.S.C. §1983 ordered expunged and destroyed a public report filed by a state grand jury after investigation of the Kent State tragedy. The narrative report accused unnamed but identifiable faculty members of responsibility for the tragic consequences of the demonstration because of certain public statements they had made. The court concluded that the report exceeded the grand jury's powers under Ohio law; invaded the function of the petit jury by purporting to make findings of fact, rather than allegations based solely on probable cause; and violated requirements of grand jury secrecy. None of those objections can be levelled against the Report and Recommendation in the present matter, which merely requests transmittal of material concerning the President to another tribunal for any action it considers appropriate.

Significantly, the court concluded that even the accusatory report submitted there had not denied the identifiable



individuals any rights to due process, to confront witnesses, and to be informed of specific charges under the Fifth, Sixth, and Fourteenth Amendments, but that in the circumstances the report had violated First Amendment rights of free speech and free association. See 323 F. Supp. at 337-351.

Defendants also may be concerned that they may be prejudiced by pre-trial publicity attributable to the Report, to the transmittal of the material, and to any subsequent use of the material by the Congress. That concern is wholly speculative. Although it is true that these events may provide one more instance of pre-trial publicity that defendants will be able to cite in support of a claim that the Court will not be able to empanel an unbiased jury for the trial of the charges now pending against these defendants, see, e.g., Delaney v. United States, 199 F.2d 107 (1st Cir. 1952), the existence of pre-trial publicity does not support, ipso facto, a claim of prejudicial publicity. The courts "are not concerned with the fact of publicity but with the assessment of its nature." Silverthorne v. United States, 400 F.2d 627, 631 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971). At this time it is impossible to assess the precise impact of any such publicity on forthcoming trials, but certain factors lead us to believe that the impact will be minimal.

First, the degree of publicity will depend on how the materials are used. The Grand Jury has asked expressly in its Report and Recommendation that the materials transmitted be received, considered, and utilized with due regard for avoiding unnecessary interference with the fair trials of any persons under indictment. This is no idle hope. The House Committee on the Judiciary recently promulgated rules specifically designed to guard against the publication of evidence considered

by the Committee or its staff pursuant to the impeachment inquiry.<sup>25/</sup> In addition to barring public disclosure unless authorized by a majority of the Committee in accordance with the Rules of the House of Representatives, the rules prohibit the copying or duplicating of all materials considered by the Committee or staff. All materials will be stored in a secure area, and examination will be limited to Committee members and staff members in that area. It can be expected under these circumstances that the Committee and its staff will use the Grand Jury materials with appropriate respect for the rights of defendants in pending criminal cases, restricting publication to the extent necessary for the impeachment inquiry.<sup>26/</sup>

Second, any publicity stemming from the receipt and use of the Grand Jury material by the House of Representatives Committee on the Judiciary, as all prior publicity, will be largely factual and not inflammatory.<sup>27/</sup> It must be remembered, the issue presented for the courts is not whether a prospective juror is ignorant of the allegations surrounding a prosecution or the evidence on which it is based, or even whether he may have some impression about them, but whether "the juror can

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<sup>25/</sup> These rules, adopted on February 22, 1974, and entitled "Rules for the Impeachment Inquiry Staff" and "Procedures for Handling Impeachment Inquiry Material", are attached hereto as Exhibit "A".

<sup>26/</sup> As reflected by Local Rule 1-27(c)(6) of this Court and by the pre-trial publicity order entered by the Court in United States v. Mitchell, et al. on March 1, 1974, the concern about minimizing pre-trial publicity concerning a criminal case cannot and should not "preclude the holding of hearings or the lawful issuance of reports by legislative . . . bodies."

<sup>27/</sup> This situation is wholly unlike Sheppard v. Maxwell, 384 U.S. 333(1966), and Rideau v. Louisiana, 373 U.S. 723 (1963), where the Supreme Court reversed convictions for highly inflammatory publicity harping on the guilt of particular individuals and creating the aura of public persecution.

lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961). The Special Prosecutor is confident that notwithstanding prior publicity, if jurors are selected with the care required by the decisions in this Circuit, all defendants will receive a fair trial.

Third, any speculation about the effect of pre-trial publicity is premature. Only at the voir dire for selecting a jury can the court determine with measured assurance whether it has become impossible to select an impartial jury. The governing rule for this Circuit, as well as the underlying rationale, is stated in Jones v. Gasch, 404 F.2d 1231, 1238-39 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968):

The ultimate question . . . is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the voir dire examination. It is then, and more usually only then that a fully adequate appraisal of the claim can be made, and it is then that it may be found that, despite earlier prognostications, removal of the trial is unnecessary. Jurors manifesting bias may be challenged for cause; peremptory challenges may suffice to eliminate those whose state of mind is suspect. Frequently the problem anticipated works itself out as responses by prospective jurors evaporate prior apprehensions. (Emphasis added.)

If some impact is actually detected, the court can fashion appropriate remedies, like a continuance or a change of venue, to deal with the problem in a concrete setting.

Thus, under these circumstances, there are no weighty factors tending to offset the compelling case for the Court to exercise its power to honor the Grand Jury's recommendation. The House of Representatives, by a vote of 410 to 4, has resolved that the Committee on the Judiciary "is authorized and

directed to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States." H. Res. 803, 93d Cong., 2d Sess. (February 6, 1974). There can be no question of the overriding interest of the country in an expeditious and informed inquiry. After careful consideration, the Grand Jury has determined that it has evidence that has a material bearing on this inquiry. Any delay in transmitting this evidence -- for example, until after the trial of pending criminal cases -- will needlessly impede the House in the discharge of its critically important function. The integrity of the Court's own processes is in no sense endangered because the risk of prejudicial pre-trial publicity from following the recommendation of the Grand Jury is minimal and there are procedures for testing any such impact at a later time.

#### IV. CONCLUSION

Because the Court can fulfill its own responsibilities while effectuating the proper constitutional roles of the Grand Jury and the Congress, the overall public interest clearly impels the Court to grant the Grand Jury's recommendation that the evidence it identified and submitted be transmitted forthwith to the Committee on the Judiciary of the House of Representatives.

Respectfully submitted.

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LEON JAWORSKI  
Special Prosecutor

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PHILIP A. LACOVARA  
Counsel to the Special  
Prosecutor

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PETER M. KREINDLER  
Executive Assistant to the  
Special Prosecutor

Watergate Special Prosecution Force  
1425 K Street, N. W.  
Washington, D. C. 20005

Attorneys for the United States  
and the Grand Jury

DATED: March 5, 1974

# EXHIBIT Q

United States Court of Appeals  
For the District of Columbia Circuit

UNITED STATES COURT OF APPEALS **FILED** JUL 7 1998  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Special Division

Division for the Purpose of  
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In Re: Madison Guaranty Savings  
& Loan Association

Division No. 94-1

**FILED UNDER SEAL**

Before: SENTELLE, *Presiding Judge*, and BUTZNER and FAY, *Senior Circuit Judges*.

**ORDER**

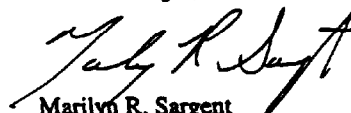
Upon consideration of the "Ex Parte Motion for Approval of Disclosure of Matters Occurring Before a Grand Jury" filed by Independent Counsel Kenneth W. Starr on July 2, 1998, the Court finds that it is appropriate for the Independent Counsel to convey the materials described in that motion to the House of Representatives. Accordingly, it is

**ORDERED** that the motion be granted. The Court hereby authorizes the Independent Counsel to deliver to the House of Representatives materials that the Independent Counsel determines constitute information of the type described in 28 U.S.C. § 595(c). This authorization constitutes an order for purposes of Federal Rule of Criminal Procedure 6(e)(3)(C)(i) permitting disclosure of all grand jury material that the independent counsel deems necessary to comply with the requirements of § 595(c). This order may be disclosed as required in connection with the Independent Counsel's compliance with his statutory mandate.

**Per Curiam**

For the Court:  
Mark J. Langer, Clerk

by

  
Marilyn R. Sargent  
Chief Deputy Clerk

# **EXHIBIT R**



**U.S. House of Representatives**  
**Committee on the Judiciary**

Washington, DC 20515-6216  
One Hundred Sixteenth Congress

April 11, 2019

The Honorable William P. Barr  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Dear Attorney General Barr:

I write today to reiterate my prior requests that you work with us and the relevant court to release any grand jury information to the House Judiciary Committee,<sup>1</sup> and remind you of the limited scope of grand jury rules in terms of shielding information in any event.<sup>2</sup> In addition, if you choose to proceed with your plan to “color code” redactions (as indicated in your April 9 testimony), that action cannot serve as a basis to seek to deny the Judiciary Committee access to any redacted grand jury information in any future legal determination.

As I have previously noted, in the event the Department of Justice makes redactions pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, “[t]he mere fact that information has been presented to the grand jury” does not mean that the information is prohibited from disclosure,<sup>3</sup> nor does “[t]he mere fact that [] documents were subpoenaed” by a grand jury mean they fall within the scope of Rule 6(e).<sup>4</sup> It is therefore clear the Department

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<sup>1</sup> Letter from Speaker of the House Nancy Pelosi, Senate Democratic Leader Charles E. Schumer, House Comm. on the Judiciary Chairman Jerrold Nadler, Senate Comm. on the Judiciary Ranking Member Dianne Feinstein, H. Perm Select Comm. on Intelligence Chairman Adam Schiff, and Senate Select Comm. on Intelligence Comm. Ranking Member Mark Warner.

<sup>2</sup> Letter from Chairpersons Jerrold Nadler, H Comm. on the Judiciary, Elijah Cummings, H. Comm. on Oversight & Reform, Adam Schiff, H. Perm. Select. Comm. on Intelligence, Maxine Waters, H. Comm. on Fin. Servs., Richard Neal, House Comm. on Ways & Means, and Eliot Engel, H. Comm. on Foreign Affairs, to Att’y Gen. William P. Barr (April 2, 2019).

<sup>3</sup> *Labow v. Dep’t of Justice*, 831 F.3d 523, 529 (D.C. Cir. 2016) (citing *Senate of the Com. of Puerto Rico v. Dep’t of Justice*, 823 F.2d 574, 584 (D.C. Cir. 1987) (R.B. Ginsburg, J.)).

<sup>4</sup> *Id.* at 530. Because a person receiving the documents would not know whether they were obtained through a grand jury subpoena or other means, “subpoenaed documents would not necessarily reveal a connection to a grand jury.” *Id.* at 529. The D.C. Circuit recently reaffirmed this principal in *Bartko v. Dep’t of Justice*, where it made clear that “copies of specific records provided to a federal grand jury” were not automatically covered by Rule 6(e) and that

cannot withhold portions of the Special Counsel's report merely because they discuss information that was presented to the grand jury or documents that were obtained through a grand jury subpoena. That is particularly relevant with regard to Special Counsel Mueller's report and underlying evidence because, as your March 24, 2019 letter indicated, the Special Counsel's Office obtained a great deal of evidence by other means, such as voluntary witness interviews, voluntary document productions, and search warrants.<sup>5</sup>

In the event the Department and Committee cannot reach an accommodation regarding any disputed Rule 6(e) and other redactions, the Committee would anticipate pursuing mandatory process. Please be advised that if you proceed with any plan to color code redactions, such action cannot serve as a basis to deny the Judiciary Committee access to any redacted grand jury information in connection with any future legal dispute.

This is because the operative case law precludes the Department from arguing that redactions made on the basis of Rule 6(e) must be upheld because subsequent release of the underlying material would itself reveal a connection to grand jury proceedings. In *Labow v. Dep't of Justice*, the D.C. Circuit held that "the relevant question is whether the [materials] would have revealed the inner workings of the grand jury had they been released in response to the *initial* . . . request."<sup>6</sup>

For these reasons, the Committee requests and expects the Department to adhere to relevant judicial precedent in the course of applying any redactions on the basis of Rule 6(e). Should the Department misapply the scope of Rule 6(e) or the applicable caselaw, any such errors cannot later form a basis for withholding the material improperly redacted.

If the Department has any questions or concerns about this request, please inform me as soon as possible.

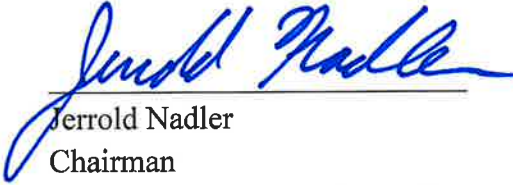
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"the mere fact the documents were subpoenaed fails to justify withholding under Rule 6(e)." 898 F.3d 51, 73 (D.C. Cir. 2018) (quoting *Labow*, 831 F.3d at 530).

<sup>5</sup> Because evidence was obtained through these other means, the Department would have no basis to withhold information or descriptions of materials that it happens to have gathered by issuing grand jury subpoenas. So long as those materials do not on their face "reveal a connection to a grand jury," Rule 6(e) does not bar their disclosure. *Id.* (quoting *Labow*, 831 F.3d at 529).

<sup>6</sup> *Labow*, 831 F.3d at 530 (emphasis added).

Sincerely,



Jerrold Nadler  
Chairman  
House Committee on the Judiciary

cc: Doug Collins  
Ranking Member  
House Committee on the Judiciary

# **EXHIBIT S**



**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

May 6, 2019

The Honorable Jerrold Nadler  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairman Nadler:

I write in response to your May 3, 2019 letter to the Attorney General. We appreciate the House Committee on the Judiciary's (Committee) offer to negotiate a reasonable accommodation to the demands made by the April 18, 2019 subpoena, and we emphasize the Department of Justice's (Department) continued willingness to engage in good faith with the Committee on these issues consistent with its obligations under the law. We were disappointed that the Committee took initial steps this morning toward moving forward with the contempt process.

The Department reiterates its concerns with the Committee's rush to issue a subpoena immediately after the Attorney General took the extraordinary step of publicly disclosing, with as few redactions as possible, the confidential report of Special Counsel Robert S. Mueller, III, and after he took the further step of making an even-less-redacted version available to a bipartisan group of congressional leaders. The Committee did so even though you have yet to take advantage of the Department's offer to review the less-redacted version of the Special Counsel's report—which naturally raises questions about the sincerity of the Committee's interest in and purported need for the redacted material. Your refusal to review the less-redacted report also hinders our ability to engage in a meaningful discussion about what specific information Congress needs in furtherance of its legitimate legislative activities. Furthermore, the Committee has not articulated any legitimate basis for requesting the law enforcement documents that bear upon more than two dozen criminal cases and investigations, including ongoing matters, and does not identify any available legal basis to authorize the Department to ask a court to share materials protected by Rule 6(e) of the Federal Rules of Criminal Procedure. Indeed, the Committee fails even to address the D.C. Circuit's recent decision on this question. *See McKeever v. Barr*, 920 F.3d 842, 844–45 (D.C. Cir. 2019).

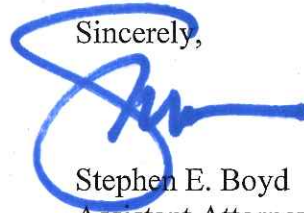
Nonetheless, as we have made clear from the outset, the Department welcomes the Committee's offer to attempt to negotiate an acceptable accommodation of our respective interests on these issues. We are prepared to discuss the matters raised in your letter, including your request to provide greater access to the less-redacted version of the report to additional Members of Congress and staff, as well as prioritizing review and possible disclosure of certain materials cited

The Honorable Jerrold Nadler  
Page Two

in the Special Counsel's report, provided that such access and disclosure is done lawfully and in a manner that protects long-established Executive Branch confidentiality interests.

To that end, we invite members of your and the Ranking Member's staff to the Department on the afternoon of Wednesday, May 8, 2019 to negotiate an accommodation that meets the legitimate interests of each of our coequal branches of government. In order to make the meeting productive, we believe that it would make sense for you to at least review the less-redacted version of the report in advance, and we will take steps to ensure that it remains available to you prior to the meeting. We are available to discuss further details of the meeting with you in advance.

Sincerely,



Stephen E. Boyd  
Assistant Attorney General

cc: The Honorable Doug Collins  
Ranking Member  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, DC 20515

# **EXHIBIT T**

RPTR JOHNSON

EDTR ZAMORA

LESSONS FROM THE MUELLER REPORT, PART III:  
"CONSTITUTIONAL PROCESSES FOR ADDRESSING  
PRESIDENTIAL MISCONDUCT"

Friday, July 12, 2019

House of Representatives,  
Committee on the Judiciary,  
Washington, D.C.

The committee met, pursuant to call, at 9:10 a.m., in Room 2141, Rayburn House Office Building, Hon. Jerrold Nadler [chairman of the committee] presiding.

Present: Representatives Nadler, Lofgren, Jackson Lee, Cohen, Johnson of Georgia, Deutch, Bass, Cicilline, Swalwell, Lieu, Raskin, Jayapal, Demings, Scanlon, Garcia, Neguse, Stanton, Dean, Mucarsel-Powell, Escobar, Collins, Gohmert, Jordan, Gaetz, Johnson of Louisiana, Biggs, McClintock, Lesko, Cline, Armstrong, and Steube.

Staff Present: Arya Hariharan, Deputy Chief Oversight Counsel; David Greengrass, Senior Counsel; Lisette Morton, Director Policy,



Planning and Member Services; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Susan Jensen, Parliamentarian/Senior Counsel; Sophie Brill, Counsel; Matt Morgan, Counsel; Brendan Belair, Minority Staff Director; Bobby Parmiter, Minority Deputy Staff Director/Chief Counsel; Jon Ferro, Minority Parliamentarian/General Counsel; Paul Taylor, Minority Chief Counsel, Constitution Subcommittee; and Andrea Woodard, Minority Professional Staff Member.

Chairman Nadler. The Judiciary Committee will please come to order. Without objection, the chair is authorized to declare recesses of the committee at any time.

We welcome everyone to today's hearing on Lessons from the Mueller Report, Part III: Constitutional Processes for Addressing Presidential Misconduct.

I will now recognize myself for an opening statement.

The title of today's hearing is Lessons from the Mueller Report, Part III: Constitutional Processes for Addressing Presidential Misconduct. As many of you may already know, the subtitle is a quote taken directly from Volume II of the Mueller report where the special counsel describes why he did not reach a, quote, prosecutorial judgment, close quote, regarding President Trump's conduct.

There the special counsel explained that as an attorney operating within the Department of Justice, he is bound by Department policy, including an Office of Legal Counsel opinion that asserts that a President is immune from prosecution while in office.

The special counsel, quote, recognized that a Federal criminal accusation against a sitting President would place burdens on the -- undue burdens on the -- or burdens on the President's capacity to govern, close quote. Yet the Mueller report also acknowledged that such an accusation could, quote, potentially preempt constitutional processes for addressing Presidential misconduct, close quote.

The special counsel's mention of these constitutional processes

should not be taken lightly. It goes to the heart of Congress' role in our constitutional system of checks and balances, and that is the subject of today's hearing.

As the Mueller report's frequent references to Congress make clear, Congress has a role in investigating the potential Presidential misconduct he uncovered so that it may determine how best to exercise its Article I authorities to act as check on the abuse or misuse of executive branch power.

In light of its jurisdiction and past precedent, this committee in particular has a constitutional duty to investigate allegations of misconduct by executive branch officials, including the President of the United States, and is currently investigating allegations of abuse of power, public corruption, and obstruction of justice within the Trump administration.

The purpose of this hearing is to examine the range of constitutional remedies available for addressing Presidential misconduct under its authority Article I authorities. Today's discussion will aid the committee in determining the remedies available to it as the investigation unfolds.

Under its Article I authorities, Congress has a number of responses to Presidential misconduct available to it. With regard to the committee's responsibility to determine whether to recommend Articles of Impeachment against the President, Articles of Impeachment are already -- I'm sorry -- Articles of Impeachment are under consideration as part of the committee's investigation, although no

final determination has made.

In addition, the committee has the authority to recommend its own Articles of Impeachment for consideration by the full House of Representatives.

The committee seeks documentary evidence and intends to conduct hearings with Mr. McGahn and other critical witnesses testifying before us. That is necessary to determine whether the committee should recommend Articles of Impeachment or any other Article I remedies, and, if so, in what form.

The committee is also considering other responses to the conduct under investigation. While censure of the President is rare, Congress has previously passed measures expressing disagreement with specific Presidential conduct. The committee is considering several pieces of legislation that would address the allegations of misconduct uncovered by the special counsel's investigation and other serious policy concerns raised by the Mueller report.

Legislative proposals to determine misconduct described in the Mueller report include measures that would increase transparency with regard to White House communications concerning law enforcement investigations. Those proposals also include measures to impose additional safeguards to protect the integrity and independence of future special counsel investigations.

The committee also has been referred proposals to amend the Constitution to limit the scope of executive clemency and legislation to increase transparency regarding Presidential pardons, which

responds to additional fact patterns described in the report.

Volume I of the Mueller report also documented numerous troubling contacts between the Trump campaign and individuals associated with the Russian Government. As a result, several Members have introduced legislation that would impose a duty on campaigns to report their contacts with foreign governments.

With regard to possible criminal, civil, or administrative referrals, the Justice Department has discretion as to whether to act upon a referral by Congress for prosecution or civil enforcement. As even DOJ policy acknowledges, a President is not immune from criminal prosecution after leaving office, and I have introduced legislation that would toll the statute of limitations on Federal offenses during a President's term in office.

State authorities may also enforce State laws against the President. The congressional referral process serves the important purpose of creating a record and preserving evidence for such time as prosecution, civil enforcement, or other administrative response is feasible.

The committee cannot, however, determine which Article I remedies are appropriate without first ascertaining all of the relevant facts, and it cannot do so when the administration refuses to cooperate with legitimate congressional oversight. That is why today's hearing will also give the committee the opportunity to consider the lawfulness of the administration's efforts to limit congressional oversight requests.

The Trump administration has asserted that several current and former government officials are, quote, absolutely immune, unquote, from having to comply with congressional subpoenas for testimony. However, the only court to ever consider such claims rejected them in a case involving this very committee's past effort to seek information about inappropriate White House involvement in the firing of several U.S. attorneys.

In addition to asserting claims of absolute immunity, in quotes, the White House has instructed several witnesses not to comply with the committee's duly issued subpoenas for documents or to answer questions on the basis that the documents and answers are subject to executive privilege or would otherwise, quote, implicate constitutionally based executive branch confidentiality interests, close quote. Needless to say, these assertions raise a host of problematic legal and constitutional issues.

We have a distinguished panel of witnesses who can help us sort through the various constitutional processes implicated by the Mueller report, and I look forward to hearing their testimony.

It is now my pleasure to recognize the ranking member of the Judiciary Committee, the gentleman from Georgia, Mr. Collins, for his opening statement.

[The statement of Chairman Nadler follows:]

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

Mr. Collins. Thank you, Mr. Chairman.

I was sorry I was -- for a moment, I was -- you ever have one of those dreams, and there have been movies about this. You have a dream that you wake up and you're back in school, you're back in high school. For me, it was back in Ms. McCall's class in North Hall High School government, American Government class. And it's the proper role of government and the different checks and balances and, you know, what is Congress' role and what's the President's role and what's the judiciary's role.

We can stop this hearing right now, because the chairman just laid out all of the congressional routes and avenues that Congress has to it. And we're going to have a time -- and I'm glad the panel's here. Y'all are great folks. You've got scholarly work. We're going to hear some, you know, wonderful things. But we've stopped right here. The problem is we're just dragging this on.

It's not that you want to come to impeachment. The chairman talked about impeachment. If that's what you want to do, then that's the part -- we don't need to discuss is this a constitutional right of Congress to do impeachment. That is exactly what Congress' right to do. The constitutional processes are very well addressed in the Constitution and in our processes.

But instead, we come here today to have another almost impeachment hearing but not an impeachment hearing. We want to get facts; we want to do this. No, we're just waiting on and on.

I'm trapped back in 9th grade. Ms. McCall was a wonderful teacher, but I don't want to go back through it again. This is black and white. We know this problem here.

So what are we not doing? Instead of this morning at 9 o'clock on a Friday, on a fly-out day, when we are actually -- the chairman and I have a bill on the floor here in just a little bit that actually touches real people's lives in New York from the 9/11 fund, which is a very valid thing that we need to be doing.

Yesterday, we spent this entire committee time arguing over subpoenas and the discussion on the border, but yet why wouldn't we use this 9 o'clock time to actually have a markup of actual immigration bills such as mine that addresses border issues? Now, you may discuss agree with what I propose, but that's what markups are for. That's what actually is taking this time. And you have a bill. Put your bills up. Let's actually get to actually solving real issues instead of having theoretical college discussions on what is Congress' power. If we don't know what Congress' power is now, this hearing is not going to help us. In fact, it's ridiculous.

Legislation. I agree with the chairman. The chairman talked about election -- which actually the Mueller report actually found election interference. Why aren't we putting those bills forward instead of having our authority taken over by the House Admin Committee on election bills because they don't want to run it through here? Let's solve problems.

Process. Here's our biggest thing from yesterday. And maybe



this is it, is what the process is. We know what the process is. The majority just can't find their way to figure out what they want to do with that process.

And so next week, we have Robert Mueller coming in here, and the whole bottom row is disenfranchised, for the most part. I guess there is some more negotiations going on. I've read that in the media. Maybe I need to call Chairman Schiff and make sure that that was okay, because they were undoubtedly driving this ship, because they all get to talk next week. My side doesn't and neither does the Democratic side get to talk. It disenfranchises Florida, it disenfranchises North Dakota, it disenfranchises everyone.

But instead of that, we're doing this. It just, frankly, boggles the mind. But I will say this: If there's anybody on this committee -- and there are very wonderful people on both sides of this committee who are very, very intelligent. And you can ask your questions today, and we can talk about the constitutional process, and you have got some great folks here to talk to you about it.

But in all due respect, we know what the constitutional process is here. We just want to dance around it so we can keep another round of stories going that the Judiciary Committee is pursuing harassment and doing what it needs to do to make sure this administration is held accountable because we don't like him.

The economy is good, life is going better, and we don't like it because we don't like the November 2016 election. That's all this is about. We found that out again yesterday. We're going to find it out

again this morning.

So for everybody who didn't get to the wonderful ability to be in Ms. McCall's 9th grade American Government class at North Hall High School, this may be your opportunity. Get your hornbooks out, get your study books out. This is going to be a constitutional process of what we already know is our processes, but we're going to have some experts tell us what those processes are.

Mr. Chairman, there's a lot of things you could be calling today. This isn't one of them. Why don't we actually take up real legislation to fix the border crisis, to fix the issues that we all talk up about here? Instead, we have hearings.

Our body is to actually legislate. You and I have legislated before. Let's start legislating and stop the show. But it is again -- the popcorn is cooking. It's time, as I've always said, let the show begin.

I yield back.

[The statement of Mr. Collins follows:]

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

Chairman Nadler. Thank you, Mr. Collins.

And I will now introduce today's witnesses.

Caroline Fredrickson is president of the American Constitutional Society for Law and Policy. Previously, she was the director of the American Civil Liberty Union's Washington legislative office, held various positions in the Senate and served in the Clinton administration.

Ms. Fredrickson received her JD from Columbia Law School, in my district, and her BA from Yale University.

John Eastman is the Henry Salvatori Professor of Law and Community Service and the former dean at Chapman University's Dale Fowler School of Law. He also serves as director of the Center for Constitutional Jurisprudence at the Claremont Institute. Previously, Dr. Eastman served as a law clerk to Justice Clarence Thomas and to Judge J. Michael Luttig.

Dr. Eastman received his Ph.D. from Claremont Graduate School, his JD from the University of Chicago Law School, and his BA from the University of Dallas.

Michael Gerhardt is the Samuel Ashe Distinguished Professor in Constitutional Law at the University of North Carolina School of Law in Chapel Hill. Professor Gerhardt served on then President-elect Bill Clinton's Justice Department transition team and drafted the administration's judicial selection policy. He later served as special counsel to the Clinton administration and the Senate Judiciary

Committee.

Professor Gerhardt received his JD from the University of Chicago Law School, his MS from the London School of Economics, and his BA from Yale University.

We welcome our distinguished witnesses, and we thank you for participating in today's hearing.

Now if you would please rise, I'll begin by swearing you in.

Would you raise your right hands.

Do you swear or affirm under penalty of perjury the testimony you're about to give is true and correct, to the best of your knowledge, information, and belief, so help you God?

Thank you.

Let the record show the witnesses answered in the affirmative. And thank you and please be seated.

Please note that your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes. To help you stay within that time, there's a timing light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals your 5 minutes have expired.

Mr. Fredrickson, you may begin -- Ms. Fredrickson -- I'm sorry -- you may begin.

TESTIMONY OF CAROLINE FREDRICKSON, PRESIDENT, AMERICAN CONSTITUTION SOCIETY; JOHN EASTMAN, HENRY SALVATORI PROFESSOR OF LAW AND COMMUNITY SERVICE AND DIRECTOR, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, CHAPMAN UNIVERSITY, FOWLER SCHOOL OF LAW; AND MICHAEL GERHARDT, SAMUEL ASHE DISTINGUISHED PROFESSOR IN CONSTITUTIONAL LAW, THE UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW

TESTIMONY OF CAROLINE FREDRICKSON

Ms. Fredrickson. Good morning. Thank you, Mr. Chairman.

My name is Caroline Fredrickson. I'm the president of the American Constitution Society.

ACS has worked to promote informed public evaluation of the investigations into Russian interference in the 2016 election. It is with this background that I'm pleased to testify on the constitutional processes for addressing Presidential misconduct.

The final report issued by Special Counsel Robert Mueller on Russian interference in the 2016 election reached several chilling conclusions. Russia conducted wide-ranging attacks on our Nation's election system. The Trump campaign had multiple contacts with Russian nationals and did not report these interactions to U.S. authorities. And there's substantial evidence that President Trump repeatedly attempted to thwart the investigation, including through his unheeded requests to the White House Counsel to fire the special

counsel, create a false paper trail, and make public misrepresentations regarding this incident.

To say these findings are troubling is an understatement. It is Congress' constitutional duty to respond. Close examination of how Russia executed these interference strategies is necessary to inform this committee and other committees of jurisdiction how to best tailor a wide range of legislative initiatives on subjects from electronic data protections to the provision of additional funding or resources for U.S. agencies responsible for monitoring and investigating foreign interference, to the integrity of special counsel inquiries, to ensuring limits on political interference with Department of Justice decisionmaking.

Although congressional oversight might eventually lead to impeachment, it does not have to do so. The Supreme Court has long held that Congress' oversight authorities are inherent in the Article I legislative powers. These authorities are broad and encompass matters including, quote, the administration of existing laws, proposed or possibly needed statutes, and probes to expose corruption, inefficiency, and waste. Indeed, the Court has emphasized that oversight is essential to the conduct of government.

This committee has additional constitutional authorities to conduct oversight, under Article I, Section 2, stating that the House of Representatives has the sole power of impeachment.

Congressional investigations often lead to new laws, but some investigations have led Congress to conclude that enacting new laws

is not necessary to address issues identified in the inquiry. Sometimes congressional oversight has led to executive branch reforms. Other times, inquiries into alleged administration corruption have resulted in resignations, referrals, House or Senate resolutions memorializing disapproval of Presidential or other administration misconduct, or impeachment proceedings.

Congressional oversight history is replete with investigations into alleged White House misconduct that did not involve impeachment. Many involved testimony from top White House aides, including White House counsels, chiefs of staff to the President, National Security Advisors, and top advisors to the Vice President and First Lady. Impeachment proceedings have begun without any formal vote of the House.

In addition, for Presidential impeachments, the Judiciary Committee has conducted hearings to determine whether or not to recommend articles to the full House. In the impeachment of President Nixon, the House Judiciary Committee had been considering Articles of Impeachment for close to a year before there was a full House vote in February 1974.

With respect to the Mueller report and related information, several key unanswered questions demand rigorous congressional review. For example, how can Congress best protect our elections from future attacks by Russia or other hostile nations? Why did Trump campaign officials, associates, and then-candidate Trump continue to have contact with Russians after becoming aware of the hacking? Why did

some lie to investigators about these contacts, and why did they suggest publicly that Trump, quote, had nothing to do with Russia? Does the substantial evidence of obstruction of justice and other misconduct merit further congressional action, including legislation, censure, impeachment, or referrals? And finally, does the content behind the Mueller report redactions and gaps in evidence suggest any additional wrongdoing by the President or others?

Congress' job has been made substantially harder by the administration's intransigence in resisting congressional oversight at every turn, instructing officials to disobey congressional subpoenas, and invoking broad claims of executive privilege. And it has gone so far as to claim that this committee even lacks authority to investigate these matters in the first instance.

Given the gravity of the Mueller report conclusions and the related information that has emerged publicly to date, a failure by Congress to examine these issues would constitute an abdication of Congress' fundamental constitutional oversight responsibilities.

Thank you.

[The statement of Ms. Fredrickson follows:]

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Chairman Nadler. Thank you.

Dr. Eastman.

#### TESTIMONY OF JOHN EASTMAN

Mr. Eastman. Thank you, Chairman Nadler and members of the committee. I'm delighted to be here to participate in this hearing.

But before turning to the substance of my remarks and addressing the precise question you've posed, I think it's important to take issue with the underlying assumption of the hearing contained in the full title of this hearing.

By tying the question of Presidential misconduct to the Mueller report, you imply that the Mueller report identified Presidential misconduct that should trigger whatever constitutional processes might be available. As a factual matter, I could not disagree more, for I do not find anything in that report even remotely rising to the level that would trigger the one constitutional path designed to address Presidential misconduct, and that's impeachment.

I should also note that this is not the first time the judiciary -- a congressional judiciary committee has considered this question. In 1998, the Senate Judiciary Committee, Subcommittee on the Constitution, held a hearing on impeachment or indictment. I commend the proceedings of that hearing to your attention, particularly the extremely persuasive testimony and submitted scholarly work of Yale

law professor, Akhil Amar. The conclusion he reached then is the same one I reach now, and it is the same one that has been reached by the Office of Legal Counsel in both Democrat and Republican administrations spanning nearly a half a century.

Because of the unique role the Constitution assigns to the Office of President, a sitting President cannot be indicted. That does not place the President above the law, as some have claimed, but it does recognize that the sole remedy envisioned by the Constitution for illegal conduct by a President, while he is President, is the impeachment process outlined in Article I, Section 3.

As Professor Amar so aptly put it, the grand jury in such a case is the House, the indictment is the Articles of Impeachment, and the Senate is the petit jury.

I won't go through the -- the conclusions of those two OLC reports, other than to very quickly summarize them. The notion that the President can be himself a criminal defendant in a Federal prosecution would put him on both sides of the criminal prosecution. He is, after all, the Chief Executive of the Nation, responsible for the prosecutorial function of the Federal Government.

It's also true that he has unique official duties that no one else in the government has, most of which, as the OLC report in 2000 under the Clinton administration acknowledged, most of which cannot be exercised by anybody else. That strongly counseled them, both OLCs, to conclude that the President could not -- not only not be tried or incarcerated if convicted, but not even indicted, because it would

amount to such a fundamental intrusion on his executive duties, and therefore, impact greatly the entire Nation.

But there's a third thing that the OLC report in 2000 offered that I think is even more dispositive: The President's role as guardian and executor of the 4-year popular mandate expressed in the most recent balloting for the Presidency. To allow a single prosecutor or a single grand jury regionally drawn in someplace in the country the ability to incapacitate a President who had been chosen through a national election by the people -- by the whole people of the United States is really contrary to our basic system of government. That's why the OLC concluded the decision to terminate the mandate is more fittingly handled by the Congress than by a jury.

And I think I want to close by looking at those OLC reports. They focus on the fact that the impeachment process is done by elected Members of Congress who are politically accountable. And it's that piece that I want to focus on. Because if there is indeed anything in the Mueller report that rises to the level of treason, bribery, or other high crimes and misdemeanors, then the Members of this body will likely be held accountable politically if the House does not initiate impeachment proceedings.

But the flip side of that coin is also true. If, as I believe is clearly the case, nothing identified in the Mueller report remotely rises to that level, then the Members of this body who continue to pursue impeachment investigations and even formal impeachment proceedings that manifestly appear to the public to be an attempt to distract the

President from the performance of his constitutional duties, or worse, to negate the results of the 2000 election, then they too should be and likely will be held politically accountable. That's why the Constitution assigns this awesome oversight authority to this body, but it comes with a political accountability that flows from that.

We can get into the question and answer about the specific instances, but I think that the various instances that are alleged for obstruction of justice or Russia collusion pale in comparison to some of the things we know occurred by the prior administration. And it's that level of comparison that I think the American people will ultimately choose to make as the political accountability for this committee and every Member of the House of Representative if they continue to pursue these things.

Thank you for your attention.

[The statement of Mr. Eastman follows:]

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Chairman Nadler. Thank you.

Professor Gerhardt.

#### TESTIMONY OF MICHAEL GERHARDT

Mr. Gerhardt. Thank you, Mr. Chairman.

It's an honor to be here today and an honor to participate in today's hearings and to be a part of an important discussion about constitutional processes for Presidential misconduct.

A good place to begin our discussion, I believe, is with the Supreme Court's decision in Nixon v. Fitzgerald, a 1982 decision by the Supreme Court that held that the President is immune to civil lawsuits seeking damages based on his official conduct.

Near the end of its opinion, the Supreme Court talks about -- recognizes a number of other ways in which the Constitution allows for the President to be held accountable for his misconduct.

There are formal mechanisms, for example, such as impeachment, such as congressional oversight, such as popular elections, that allows for considerable opportunity and, in fact, legitimacy for this committee and Congress to consider which, if any, possible ways it wants to consider for holding a President accountable for his misconduct.

There's long history here, but let me cut to the chase. The first mechanism, congressional oversight, is, of course, a longstanding legitimacy. The Constitution does not require that this house follow

any particular procedures in trying to determine whether or not and how it may hold a President accountable for his misconduct. In fact, just the opposite.

Article I, Section 5 of the Constitution vests each body of Congress -- the House, the Senate -- with the authority to determine its own internal rules of governance. The committee today is doing nothing more than following through in -- following through in accordance with the House rules. That's all that's happening. It's as simple as that.

Besides congressional oversight, there are, as we recognize, other mechanisms. One of them, of course, is impeachment. I won't dally on that right now, but one thing to recognize about the possibility of impeachment is that the House, and particularly this committee, is fully entitled to consider what evidence there may be on whether a President committed misconduct, but also, what other evidence needs to be determined in order to reach a decision about whether or not to proceed further on any particular process relating to Presidential misconduct. It's that simple.

The Constitution does not require a series of hoops that this committee has to go through in order to make its determinations about what, if anything, to do with Presidential misconduct. Just the opposite, as I said. The Constitution vests considerable authority in each Chamber to determine its rules of governance, and here the committee's following through on that.

Another mechanism we haven't discussed but could is censure. I

have longed believed that censure is a legitimate option for this committee to consider, if and when it encounters or finds that a President or any other official has engaged in misconduct. The authority isn't just derived from the fact the Constitution doesn't disallow censure; the authority is established by longstanding traditions and exercise of power within this body.

For example, when Abraham Lincoln was a Member of the House of Representatives, he introduced a resolution criticizing President Polk's initiating, in his opinion, the illegal Mexican War. His resolution didn't pass, but he did vote for a resolution that did pass 82-81 holding President Polk accountable for unnecessarily initiating an unlawful war.

That's good enough for me. If President Lincoln thinks it's good enough for the House, I think it's longstanding authority we can follow.

Other mechanisms, of course, involve possible lawsuits. Civil lawsuits based on unofficial misconduct have been recognized, in *Clinton v. Jones*, as legitimate and they may proceed. In addition, of course, there may be the possibility of criminal trials.

One thing to understand about the possibility of criminal trials is, as Dr. Eastman just suggested, that there's a longstanding debate of whether or not a sitting President may be subject to criminal process. I believe so. I've set forth my arguments in my written statement. I won't expound on them here, but I'm happy to answer questions about it.

And, of course, the -- a final thing I hope you'll allow me to

just finish with is something that Raoul Berger, long recognized as one of the great authorities on impeachment, said 30 years ago in The New York Times. He said by refusing to comply with the subpoenas of the House Judiciary Committee, President Clinton is setting himself above the Constitution. No President is above the law. No President can use his authority or any of his powers to thwart the powers of this body and therefore to be above and beyond any accountability to the law.

Thank you very much for the opportunity to be here today.

[The statement of Mr. Gerhardt follows:]

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Chairman Nadler. The committee will now stand in recess for 5 minutes, and Democratic members will meet over here and the Republican members on their side.

This will be a 5-minute recess.

[Recess.]

Ms. Scanlon. [Presiding.] The committee will now resume.

And we'll now proceed under the 5-minute rule with questions, and I'll begin by recognizing Mr. Collins.

Mr. Collins. And I thank the chairwoman for doing that. We've got to go to the floor and take up the 9/11 bill, so I appreciate that. And I won't be long.

But, Mr. Eastman, let's talk just for a moment. Do you think there's any possibility that this group of attorneys and nonattorneys on this Judiciary Committee have any -- or their staffs have any problem understanding the constitutional role of Congress and oversight of the administration, on any administration?

Mr. Eastman. I don't know the background of every member, but I think the usual member ought to know the answer to that.

Mr. Collins. And that would come from just, if nothing else, life growing up and taking, you know, government classes growing up, correct?

One of the things I want to be interested in -- and there's a lot of things that people will talk about today, and we'll get into a lot of different things. But one of the problems that I've had here -- and

we talk about constitutional process. We also talk and the professor here talked about our internal processes and going on. And one of the things that I've just been very disappointed in our committee for the last 6 months is our way we handle subpoenas and the way that we have went through contempt and how we have rushed through this process and how we've instead of -- you're familiar with subpoenas, correct?

Mr. Eastman. Yes.

Mr. Collins. And how they should operate. Has a subpoena ever been -- and from a perception that you ever had, could a -- would a Black's Law Dictionary of a subpoena say that it is an opening to a dialogue?

Mr. Eastman. No.

Mr. Collins. Would it ever be said that a subpoena should be to enhance your standing in court?

Mr. Eastman. No.

Mr. Collins. Okay. If that be true, then my question is, do you believe that it hurts us as an institution when we rush through these issues of contempt and subpoena? And I would love for you to talk about that for a minute.

Mr. Eastman. Well, look, you know, I want to take up -- I agree with most of what Professor Gerhardt said. The one point of disagreement I have is I don't think he gave enough credit to the notion that these fights over congressional subpoenas and congressional testimonies by the executive are ones that arise out of a deliberate design function of the Constitution, which is a separation and a

counterbalance of powers.

Yes, the Congress has oversight authority, but there are limits to that authority, and those limits we typically classify generally as executive privilege. And so most of the fights in our Nation's history over the issuance of subpoenas and the testimony of high-ranking executive officials deal with that counterbalancing authority that the executive has. Congress cannot, in its oversight capacity, intrude on the executive functions, including the confidentiality of Presidential communications. And I think that's well established as well.

And the fight, then, is over whether these current round of subpoenas and demands for testimony are really designed to intrude on the executive in an unconstitutional way. And I think that's where the conversation has to focus.

Mr. Collins. You talk about conversation and dialogue. And this is one of the things that I've been in Congress, not my life, but the last 6-1/2 years, and I've noticed the battles that go between both Democrat and Republican administrations in the Hill. This has been going on forever.

Do you believe it's good -- and I've got several questions. Do you believe it's good for a committee just to lead, with no conversation with an individual, to lead with a subpoena?

Mr. Eastman. I don't. I think there's a lot of negotiation that has historically gone on on those issues.

Mr. Collins. And we went to the floor for contempt on very

limited terms, especially with the Attorney General in a shortened time here.

The question that I would have here is -- if you look at this from a judge's perspective, when they say -- and we talk about -- and by the way, this committee seems to be unique in this, because other committees, such as the Intel Committee, actually negotiated and began to get stuff in the proper way of back and forth and back and forth. When we go to -- if we were to try and enforce one of these contempts that we have done with lack of foundation, lack of background, do you believe it hurts this committee and this institution as a whole?

Mr. Eastman. I think it would certainly undermine the claims in the court that the subpoenas or the efforts were made in good faith, and that would certainly undermine any -- any court's plan on giving enforcement effort to those things.

Mr. Collins. I appreciate it. I know in my home county of Hall County, my judges would look at me and say go back and do your job before you bring it to me.

So with that, I do appreciate the chair's indulgence. And with that, I'll yield back.

Ms. Scanlon. Okay. Thank you.

The chair recognizes Representative Lofgren for 5 minutes.

Ms. Lofgren. Thanks very much.

I think this is an important hearing. I noted the ranking member's comment that we should be taking up other subjects instead of this one. And I can't help but recall that the Democrats, in terms

of election security, as a first order of business, introduced H.R. 1 about election security and got no help from the minority party. And my own bill, the SAFE Act, that we just passed 2 weeks ago to harden election systems got only one Republican vote. So I think that's a bit disingenuous.

Let me talk about the OLC opinion. I've been interested in that for some time, and I'm wondering whether, Ms. Fredrickson or Mr. Gerhardt, you believe that the OLC opinion would cover activities -- criminal activities for any President that occurred prior to that President assuming office.

For example, Spiro Agnew was -- left his position for bribery that was engaged in while he was in Maryland, before he was Vice President.

What is your view on that?

Ms. Fredrickson. Well, I think -- just say two quick things, and then I think Professor Gerhardt probably has a more thorough answer.

It's a -- one thing is that I think the Vice President is not covered.

Ms. Lofgren. No, I understand that. I just meant that as an example.

Ms. Fredrickson. But I think that's just one of the weaknesses of the OLC opinion, is it does seem to indicate that -- insulate a President from judicial process in a way that I think is not consistent with the rule of law as understood by the Founders.

Ms. Lofgren. One of the questions I've had, if I can throw at you, in addition, Professor Gerhardt, is, is there any limit to this?

Let's say some day in the future, President A is annoyed with the Vice President, pulls out a gun, shoots the Vice President in the head in the Oval Office. That would be a Federal crime. Would that President A in the future be immune from prosecution?

Mr. Gerhardt. I hope -- I hope not. And I respectfully disagree with the OLC opinion. Obviously, OLC does fantastic work. They're not right about everything. Everybody is subject to scrutiny. And in this case, I think they got it wrong.

I've long thought that the President is not special. Everybody in government is subject to criminal process. And should anybody in government commit a crime, they're not entitled to any immunity. I think that's the Constitution we have.

In fact, to go back to your earlier question about whether or not a President -- we can just -- let's keep it hypothetical -- commits a crime before he is elected and nobody knows about it. If we find out about it later, it's -- it becomes almost absurd to imagine that the country has to somehow sit tight for 4 or 8 years until he leaves office before he is subject to a criminal trial. If that crime has any relationship to his election, and it almost certainly does because it would have affected people's votes to know about it, then I think the Constitution gets turned on its head.

Ms. Lofgren. Let me ask you this. In terms of the OLC opinion, obviously they're just looking at Federal prosecutions. We have 50 States. If the President A shoots somebody who is not a Federal official, in a State, that would be a violation of State law.

Would -- do you believe that the Constitution prohibits a State prosecution of a President for a State law violation?

Mr. Gerhardt. I don't believe it does, but I also should just point out, for the record, that this committee and this House of Representatives has confronted this issue already, to some extent, in the case of Thomas Porteous.

Ms. Lofgren. Right.

Mr. Gerhardt. Thomas Porteous was a Federal district judge who nobody knew --

Ms. Lofgren. We were on the committee during the impeachment, so --

Mr. Gerhardt. I won't go into details, if you don't want, but I think they're quite pertinent. The point is he committed criminal misconduct before he entered his office as a Federal district judge. He didn't tell the Senate about it, and that turned out basically to be fraud against the Senate and was the basis for his impeachment.

Ms. Lofgren. Let me just ask a final question. If the DOJ opinion is correct, it seems a logical extension is that the Federal prosecutors could not be expected to actually investigate a President.

When you think back to the Nixon impeachment, Jaworski was -- you know, provided information to the Congress. Certainly, Ken Starr provided us information. I was on the committee at that time. Presumably, that would not be permitted if you could not prosecute a sitting President.

Is that -- what do you think of that?

Ms. Scanlon. Time has expired, but you can answer.

Mr. Gerhardt. Well, I think if a prosecutor finds evidence of obstruction, for example, then that may be an appropriate time to consider the propriety and legitimacy of criminal process.

I think that no one -- the very principle of no one being above the law means just what it says. Nobody's above the law. A President can't obstruct an impeachment, you know, a House committee looking into the possibility of whatever misconduct he has committed, because if he could do that, then he really is above the law.

Ms. Lofgren. Thank you. My time has expired.

Ms. Scanlon. Thank you.

The chair recognizes the gentleman from Florida for 5 minutes.

Mr. Gaetz. Thank you, Madam Chair.

Mr. Eastman, you've commented on the potential harms that can come with a special counsel that's unbridled. Is there anything you'd like to add to that?

Mr. Eastman. Well, I mean, you know, I want to pick up on something that Professor Gerhardt said, the notion that the President would be above the law. One of the things that has troubled me about the OLC opinions, which I think are correct, is that potential criminal liability may not exist at all for a sitting President for conduct either -- criminal conduct either while in office or before, given the statute of limitations problems.

Both OLC memos recommended to Congress that they could address that issue, and I would encourage you to do so. That would ensure that



no President is above the law at the end of the day. But it would also ensure -- and I think this is what the OLC memos are both based on, and they would apply whether the criminal conduct occurred while in office or before -- the unique responsibilities of the President in our system of government and the ability of a single prosecutor or a single grand jury to interfere with that. And I think that's why the OLC memos are correct.

But to remedy the one shortcoming from that, you could address the statute of limitations thing. And I think Chairman Nadler in his opening statement mentioned that that was one of the things that might be worth considering. And I would endorse that.

I do think, though, that the reasoning of the OLC memos, implicitly in the first one and explicitly in the second, also extends, although for different -- not separation of powers reasons, but for federalism reasons, to State authorities being able to indict the President. And I think they're right about that as well. That door is closed as well for the same reasons that a Federal indictment against the President, while he is sitting, is closed.

And I think that's right. It's a balancing act. But the balance, given the unique nature of the President's role and the unique nature of his election, the only one, save for the Vice President, who is elected nationally, those two things have contributed to this immunity that OLCs of both sides of the political aisle have recognized, like I said earlier, over a span of 50 years.

That doesn't keep the President off the hook, but it does shift

the discussion to a politically accountable body where people can be held to account if they abuse the investigative process.

Mr. Gaetz. You made mention of the President's unique powers and how they interface with an analysis of proper versus improper conduct, and you also make reference to the dealing with Director Comey. Is there anything you'd like to add on that front?

Mr. Eastman. Well, you know, something that Chairman Nadler said in his opening that I disagree with, and I think is important to get out here, one of the pieces of legislation that is being considered is to expose White House communications with the Department of Justice to identify whether the President is having any role in prosecutorial decisions. I think that idea fundamentally misunderstands the nature of Article II of the Constitution, which says the executive power, all of it, is vested in the President of the United States.

The Attorney General, in its prosecutorial functions at the Department of Justice, holds that power derivatively from the President. The FBI, in its investigative power, holds that power derivatively from the President. The notion that the President can't be the one to make the prosecutorial or the investigative decisions is to completely undermine that core aspect of Article II. And so I think that idea is just simply misguided.

Now, if the President decided that Director Comey -- and I outline in my testimony why I think both sides of the political aisle in Congress were upset enough with Mr. Comey to have warranted removing him long before the President did, but the President had that authority himself.

And, you know, I don't think that -- exercising an authority that he constitutionally has rises to the level of obstruction of justice.

Mr. Gaetz. Thank you, Madam Chair. I yield back.

Ms. Scanlon. The chair recognizes the gentlewoman from Texas for 5 minutes.

Ms. Jackson Lee. I thank the chair very much.

I'm going to read partly a statement by the former -- by former Federal prosecutors. And I would also like to add, having been here in 1998 and also for a number of impeachment proceedings regarding Federal judges, when Mr. Starr handed our friends on the other side of the aisle the Starr report, they immediately began impeachment proceedings. That was the historical record that was created. I don't know if they were concerned about any factual basis other than the Starr report.

In this instance, we are meticulously listening to scholars and interviewing individuals by way of subpoena and building -- the building blocks of the constitutional process and as well the building blocks of the understanding of the American people.

Each of us believes that the conduct of President Trump described in Special Counsel Robert Mueller's report would, in the case of any other person not covered by the Office of Legal Counsel policy against indicting a sitting President, result in multiple felony charges for obstruction of justice. They recount the President's efforts to fire Mueller and to falsify evidence about that report, about that effort, the President's efforts to limit the scope of Mueller's investigation

to exclude his conduct, and the President's effort to prevent witnesses from cooperating with investigators probing him and his campaign.

Professor Fredrickson, do you find agreement with 1,025 prosecutors, the possibility of such?

Ms. Fredrickson. Well, I have to say I've never been a prosecutor, but I think it's a very impressive list of some of our Nation's most illustrative prosecutors who have engaged in lengthy careers. And I think -- I take what they say very seriously. I think it is very important for this committee to go further and examine the allegations that were laid out in the Mueller report.

Ms. Jackson Lee. Thank you.

And I ask the chairwoman to ask unanimous consent to place the statement by former Federal prosecutors, part of what I just read, 1,025 indicate that the President would be subject to felony charges if he was not the President of the United States.

Let me also make mention --

Ms. Scanlon. Without objection.

[The information follows:]

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

Ms. Jackson Lee. Thank you very much -- of H. Res. 396, Resolution of Investigation, Professor Gerhardt -- and welcome to all of you, by the way, thank you so very much for your presence. It recounts -- it's under our rules 6 and 7 of House practices -- it is an instruction for the Judiciary Committee to investigate. But included in the resolution, it indicates various elements of investigation, violation of the Foreign Emoluments Clause of the United States Constitution, violation of the Domestic Emoluments Clause of the United States Constitution, obstruction of justice, abuse of power, misfeasance in public office, malfeasance in public office, failure to protect the confidentiality of national secrets from enemies, foreign and domestic -- just a litany similar almost to one -- Articles of Impeachment.

But let me ask you this. In your written testimony, you note that the theme that clearly emerges from early discussions of the scope of impeachable offenses are that they are not neatly delineated but depend on context and gravity, of which the responsibility of this is housed in the Judiciary Committee, and not all crimes are impeachable and not all impeachable offenses are crimes.

But I would ask you, is impeachment limited to criminal acts?

Mr. Gerhardt. Not at all, Congresswoman. In fact, it's important to understand that one of the most -- that a significant theme in the Constitutional Convention was that when the delegates thought of possible impeachable offenses, they were trying to figure out the

scope of them. They never listed something that wasn't actually a crime; they listed things that were not crimes. And, in fact, many impeachments have been based on things that are not crimes.

Ms. Jackson Lee. I'm going to go on to another -- can a President be impeached for conduct related to improper exercise of his Article II powers, such as removing a subordinate Federal officer? And let me add, would all communications between the President and, say, the Department of Justice always be protected, always be not subject to review or suggesting that they were inappropriate?

Mr. Gerhardt. I think it's an overreach to suggest the President somehow can insulate all his communications with anybody from congressional inquiry. That essentially makes the Presidency unaccountable.

Ms. Jackson Lee. And so can he be impeached for the improper exercise of Article II?

Mr. Gerhardt. Absolutely.

Ms. Jackson Lee. And can the President be impeached at least partly on his conduct or her conduct before assuming office?

Mr. Gerhardt. I believe if -- I've suggested both through my statement and other writings that I think a Presidency could be subject to impeachment for that.

Ms. Jackson Lee. And, clearly, the Mueller report, in Volume I, has talked about a number of incidences dealing with the Russian intrusion into our elections that seemingly this administration and the Office of the President was involved in.

Mr. Gerhardt. At the very least, this committee is entitled to look into things. So you have got the Mueller report. The Mueller report obviously contains a lot of different things, such as possible acts of obstruction of justice. It's quite reasonable and legitimate for a committee -- for this particular committee to look at that and to ask whether or not more investigation is needed.

There is nothing in the Constitution that precludes the committee. In fact, there's a lot in the Constitution that supports this committee looking at that material and deciding whether or not it does provide evidence of misconduct or whether or not it needs more evidence.

Ms. Jackson Lee. I thank the chairwoman. I yield back.

RPTR WARREN

EDTR ZAMORA

[10:16 a.m.]

Ms. Scanlon. Okay. Thank you.

The chair recognizes the gentleman from California.

Mr. McClintock. I thank you, Madam Chairman.

Dr. Eastman, the more that comes out on the Mueller report, the more I become concerned that it appears to me that they couldn't make a legal case against the President. So they decided instead to try to make a political case, and they did so by seriously misrepresenting the evidence that they had. Give you a few examples.

The John Dowd conversation, the President's lawyer, calls Robert Kelner, Michael Flynn's lawyer. The Mueller report quotes only a small portion of the conversation that leaves the impression that Dowd's trying to influence testimony. It deliberately omitted a very large part of the conversation where Dowd made it absolutely crystal clear that it was not what he was suggesting.

Another example. Konstantin Kilimnik is repeatedly referenced as a Russian Government operative in his interactions with Paul Manafort. What Mueller knew but failed to mention in his report was that Kilimnik was, in fact, a U.S. intelligence asset.

There was an article just published in The Federalist. It notes the recent developments in the Concord case that involves the Internet Research Agency, the internet troll farm at the center of the Russian



Government interference narrative. The judge in that case asked prosecutors to address also the specific tie to the Russian Government, and the DOJ responded the report doesn't say that. It was that next day that Mueller held his press conference where he walked back the linkage that he had made between the Russian Government and the internet troll farms.

So I have to tell you, having reviewed some of the material behind the report, I'm concerned this report seriously misrepresents the supporting evidence that it's supposed to be based upon. So I'd like to hear your opinion of the nature of the report itself and what does it say of the integrity of the report if exculpatory evidence was deliberately omitted from that report.

Mr. Eastman. Congressman McClintock, we've seen a number of stories about the political biases of the members of Mr. Mueller's team that have, you know, occupied our Nation's attention for some time now, and I think one of the allegations that the President attempted to obstruct judges was his alleged direction to White House Counsel Don McGahn to notify Deputy Attorney General Rod Rosenstein to fire Mueller because of his alleged conflict of interest. And I think this is critical and I think it may well full explain why we don't have in that report some of the triggering events that led to the report that any competent investigation would have explored.

And Department of Justice guidelines specifically say that people ought not to be leading an investigation when they have personal -- close, personal relationships with targets or key

witnesses of the investigation or with an organization of the investigation, and Mr. Mueller had both. He had very close, personal relationships with FBI Director Comey who, of course, whose own leak of information to The New York Times is what triggered the appointment of Mr. Mueller in the first place and who was a key witness in one of the allegations against the President about, you know, can you see your way to letting the case drop against Mr. Flynn? He suffered enough. He had a close relationship with Mr. Rosenstein who was a signer on one of the FISA warrants that triggered the whole Russia collusion story in the first place.

Those things alone ought to have forced Mr. Mueller to recuse himself because they are conflicts of interest that would have not led to his appointment under Department of Justice guidelines in the first place. For the President as the top national executive to raise the question about those conflicts is not obstruction of justice; it's doing his job. If he had said, because of that conflict, we're going to shut down the whole investigation because I don't like it going after me, then you might have had obstruction of justice, but that's not what we have here.

And the perpetuation of this myth is rising to the level of farce, and it is distracting, not only the President and the country domestically, but on the world stage. In fact, we are perilously close to the ongoing proceedings here rising to this very same level that is why the Department of Justice has over a half a century twice concluded the President ought not to be indicted while he's in office.

They recognize that the impeachment proceeding is a necessary evil that would suffer those consequences but on things that are much more grave than we have at issue here.

Mr. McClintock. Is it fair to say that this report was corrupted both by personal relationships and by political biases?

Mr. Eastman. When you see the things that are omitted from it, that's the conclusion that one has to go.

Mr. McClintock. And this is, so far, just the tip of the iceberg. They're dribbling out all the time and of grave concern.

Mr. Eastman. And I think when Mr. Horowitz' full IG report comes out on the origins of this thing, I think we're going to be shocked to learn how much more there is.

Mr. McClintock. Thank you.

Ms. Scanlon. The chair recognizes the gentleman from Tennessee for 5 minutes.

Mr. Cohen. Thank you, Madam Chair.

Firstly, I'd just like to comment the question about exculpatory evidence being put in and questioning Mr. Mueller's compliance. Mr. Mueller made clear that he did not suggest the President should be indicted or was indicted because of the OLC's opinion that he couldn't be indicted. That's pretty much dealing -- taking exculpatory evidence when you put that in. We're not indicting him because we can't do it, not because we didn't find evidence of criminal activity; and if we did, we would have said so. So that's firstly.

And, secondly, the question about his closeness to Mr. Rosenstein

and Mr. Comey. He was also close to Mr. Barr. So maybe Mr. Barr shouldn't have taken the job.

Although existing regulations governing the appointment and removal of a special counsel already provides some limitations on the removal of the Attorney General, those can be rescinded or modified because they're the Attorney General's regulations. They can modify those protections against unwarranted removal.

The chair has introduced a bill, H.R. 197, that's called the Special Counsel Independence and Integrity Act, which would codify those protections and would permit the special counsel who believes his or her removal was unlawful to contest that removal in court.

Ms. Fredrickson, what are the benefits of enacting the current protections that the Department has for unwarranted removal of a special counsel and make them statutory law?

Ms. Fredrickson. Thank you so much for the question. So, I mean, I think there are a number of benefits, and one is it's clear that the Attorney General could repeal the existing regulations, and there was quite a bit of worry that that might happen. I know -- I believe Senator Graham on the Senate side has introduced a partner to this legislation for the very same reasons, that the regulations lay out some important protections for the independence of the special counsel but they're not enough because they're not actually insulated from action by an Attorney General who might himself want to see, or herself, want to see an investigation curtailed. So I think it's an important piece of legislation to consider.

I did also just want to go back to the prior question regarding the factual disputes and the accusation that Special Counsel Mueller was biased and omitted important information. You know, I don't want to speak to that, but I do want to say it seems to me that that's actually an extremely strong reason, if people believe that, to want to get as much of this information into the public hands as possible but certainly into for this committee to review.

Mr. Cohen. I'm sure we'll do that.

How would providing a special counsel a private right of action to contest his or her unlawful removal deter some of the conduct described in the Mueller report?

Ms. Fredrickson. Well, I mean, I think that, you know, to have some kind of a legal recourse to ensure that a special counsel isn't removed for less than good cause, I think, is an important mechanism to protect that authority and to protect the integrity of an investigation that might be necessary.

Mr. Cohen. And then maybe some of the instances that were cited in the report that might amount to obstruction of justice wouldn't have occurred because they would have known that they could -- Mr. Mueller could have gone to court to contest those in an open hearing.

Ms. Fredrickson. Absolutely. And I think Mr. Mueller laid out numerous examples of where he was thwarted along the way and was threatened that if he had had some additional legal recourse --

Mr. Cohen. And let me ask. We're going to run out of time. You've read the Mueller report, have you not?

Ms. Fredrickson. Yes.

Mr. Cohen. All right. How many instances of obstruction of justice do you believe were shown where all three elements of obstruction of justice were met?

Ms. Fredrickson. Well, I think the report itself describes it in extremely good detail, but there are certainly several examples dealing with the efforts to get the White House Counsel to fire Mr. Mueller.

Mr. Cohen. That's one. And then telling Mr. McGahn to lie about it?

Ms. Fredrickson. Telling him to lie about it and to tell him to create a fake paper trail. I think all of those are --

Mr. Cohen. What are some others?

Ms. Fredrickson. The effort -- the removal of the FBI Director. There are --

Mr. Cohen. Asking Mr. Sessions to unrecuse himself?

Ms. Fredrickson. Exactly. Or asking Corey Lewandowski to go to the Attorney General to tell him to resign, holding the resignation letter for future use.

Mr. Cohen. So you don't have a specific number. That's at least four or five. Do you think there are seven or eight or four or five or 10, or how many do you think there are?

Ms. Fredrickson. Well, you know, I think that is something for this committee to consider is --

Mr. Cohen. Thank you.

Professor Gerhardt, do you have an opinion on how many there are?

Mr. Gerhardt. I'm sorry. I missed part of the --

Mr. Cohen. How many cases of obstruction of justice were in the Mueller report that you think all elements were met?

Mr. Gerhardt. While I've read it, I can't say off the top of my head how many instances there are, but I do think it's important to recognize that there is certainly evidence of possible obstruction in there. There's no question about that.

The report doesn't exonerate the President. Instead, it actually suggests at several moments that one of the processes that's important to consider, given the limitations the prosecutor felt that were imposed on him, was for Congress or this committee to look into possible evidence of misconduct. That's perfectly within the power and legitimacy of this committee.

Mr. Cohen. Thank you.

And I yield back the time I do not have.

Ms. Scanlon. Thank you.

The chair recognizes the gentleman from Texas for 5 minutes.

Mr. Gohmert. Thank you. I appreciate y'all being here.

Dr. Eastman, in looking at page 2 -- well, it's page 2 because you had a cover sheet, but talks about you're not -- you implied -- you're talking about the title of this hearing, that the Mueller report identified Presidential misconduct that would trigger whatever constitutional process might have been available. As a factual matter, I could not disagree more. I don't find anything

remotely rising to the level that would trigger the one constitutional path designed to address Presidential misconduct, namely impeachment.

But I want to take you back to the prior administration, something that was called Fast and Furious. We know crimes were committed. We had people within our Justice Department who forced people to sell guns that we knew the sales constituted a crime because we knew they were going to end up in criminal hands, and they were required to do it and we know at least one Federal agent was killed as a result. Somebody somewhere in the Justice Department had to say, we're not going to -- we're not going to prosecute that. We're not going to investigate it. We know what happened. And, of course, some of us here that reviewed e-mails that were disclosed, made public thanks to Judicial Watch, there were crimes being committed and nobody prosecuted.

During the Clinton administration, my U.S. Attorney friends back in Texas were telling me they'd been given -- and I couldn't tell you, some of them -- I couldn't tell you whether they vote Democrat or Republican, but I know they cared about justice. But they were saying they'd been directed, let's back off of the pursuit of drug crimes. Let's start pursuing white-collar crime. They got that directive.

Somebody within the Department of Justice who knew there were crimes, drug crimes being committed with regard to Fast and Furious, knew crimes were committed and at least one Federal agent died, had directed, we're not going to pursue those. Just leave them alone. This is where we want to concentrate, because obviously, no Department



of Justice can pursue every single crime.

In your opinion, just knowing what we know from the public information, would you say Eric Holder or President Obama, his boss, obstructed justice?

Mr. Eastman. Congressman, I think there's an important distinction to be made here --

Mr. Gohmert. Exactly.

Mr. Eastman. -- between prosecutorial discretion and shielding high-ranking officials. I've outlined in my testimony several other examples --

Mr. Gohmert. But the drug -- shifting from drug prosecution to white-collar crime, that's prosecutorial discretion.

Mr. Eastman. That's right. But preventing an investigation in order to shield the person that committed the crime because he was a high-ranking official or to alter the FBI investigative report on the advent of the email personal server and Hillary Clinton's conduct, to remove the language of one of the elements of the crime, I think that rises to obstruction of justice rather than prosecutorial discretion.

Mr. Gohmert. So you're talking about when James Comey eliminated the mental state necessary --

Mr. Eastman. The -- he said mental state was an element; it was not. The FBI original draft of the report called it gross negligence, which is an element of the crime. He changed that language in order to avoid the element of the crime. That's not prosecutorial discretion. I think those things do rise and have an intent to obstruct

or interfere with the investigation.

Mr. Gohmert. Well, that brings up another issue. You know, Mueller was required to -- or we know -- I'm not supposed to really get into the scopes memos I've reviewed, but -- well, at least some of them. But we know publicly he was allowed to pursue things that -- crimes that came to his attention during the investigation.

Hillary Clinton's emails, private server, disclosure of classified information, those surely came to his attention. He would have been authorized, just from what you know publicly, to pursue and investigate Hillary Clinton, would he not?

Mr. Eastman. Well, he would. And even more directly, the use of campaign funds funneled through a law firm illegally, not reported to the Federal Election Commission, to pay for the Steele dossier, which we now know had as his sources high Russian-level officials that triggered the entire narrative, that certainly was within his jurisdiction, and that's not investigated at all.

Mr. Gohmert. Yes. Well, I appreciate the effort that you took. I know all three of you got paid well for being here today.

Mr. Eastman. I missed that.

Mr. Gohmert. And for those that don't know that, didn't get paid at all. But thank you all for the time you took to prepare. Thank you.

Ms. Scanlon. The chair recognizes Mr. Johnson from Georgia --

Mr. Johnson of Georgia. I thank the chairwoman.

Ms. Scanlon. -- for 5 minutes.

Mr. Johnson of Georgia. And I've heard more and more Republicans starting to pronounce Director Mueller's name as Mueller. I've been hearing that over the past few weeks. Is that some kind of Republican attempt to somehow besmirch Director Mueller? Dr. Eastman?

Mr. Eastman. No. Maybe it's bit of my German heritage. My mother's maiden name was Stein, and the Mueller is the German pronunciation.

Mr. Johnson of Georgia. It's Mueller, and I've heard so many people saying Mueller on the other side. It just seems like there's something that -- there's some kind of secret memo flowing out there.

But, listen, you are a -- an officer. You are the chairman of The Federalist Society's Federalism & Separation of Powers Practice Group, are you not?

Mr. Eastman. I am, Congressman.

Mr. Johnson of Georgia. And so there's no doubt that you are a Republican or perhaps a Libertarian, but I suspect more Republican.

Mr. Eastman. The Federalist Society is a nonpartisan organization.

Mr. Johnson of Georgia. And it raises about \$20 million a year for its various purposes, correct?

Mr. Eastman. I've not looked into the budget of the Federal Society. I'm a chairman of one of its practice groups.

Mr. Johnson of Georgia. I understand.

Mr. Eastman. And I should say that I'm not here speaking on behalf of The Federalist Society.

Mr. Johnson of Georgia. Certainly. Certainly.

And you're familiar with Director Mueller and his reputation. You know that he is a former Marine officer, that he has practiced law both in government, outside of government, former U.S. attorney, United States Assistant Attorney General for the Criminal Division, a homicide prosecutor in Washington, D.C. He's been the Acting United States Deputy Attorney General and he's been appointed to Senate-confirmed positions by Presidents George Herbert Walker Bush, Bill Clinton, George W. Bush, and Barack Obama. And he's a Republican too.

You're familiar with that, right?

Mr. Eastman. I know he's got a long resume. I didn't know he was a Republican.

Mr. Johnson of Georgia. You didn't know he was a registered Republican?

Mr. Eastman. It doesn't matter on my criticism of the report.

Mr. Johnson of Georgia. Well, I mean, a man of that kind of distinction, you do -- you may disagree with some of the conclusions that he reached, but you have no -- you have no problem with his truthfulness and veracity, do you?

Mr. Eastman. Congressman, I have a real problem with his flipping the burden of proof in Part II of the volume.

Mr. Johnson of Georgia. That's not my question. My question, you believe him to be a man of good character?

Mr. Eastman. I don't know his character. I've never met the

man. I will say this --

Mr. Johnson of Georgia. Let me ask --

Mr. Eastman. -- he staffed his office with people --

Mr. Johnson of Georgia. Let me ask this.

Mr. Eastman. -- who had an obvious political bias, and that's troubling to me.

Mr. Johnson of Georgia. Let me ask you this. You're at a congressional hearing, the title of the hearing being about the various constitutional processes for addressing Presidential misconduct.

Now, certainly this hearing that we're having today, you don't think we're overstepping our bounds by having this hearing, do you?

Mr. Eastman. I do. I have never said that Congress doesn't have oversight authority.

Mr. Johnson of Georgia. But, I mean --

Mr. Eastman. But it can be abused, and I think --

Mr. Johnson of Georgia. For this hearing, you think that we're overstepping?

Mr. Eastman. I do. This matter has become a farce.

Mr. Johnson of Georgia. Well, question --

Mr. Eastman. It has become a farce.

Mr. Johnson of Georgia. Question asked and answered. Okay. Thank you.

Let me ask Professor Gerhardt. Sir, in your written testimony, you note that the theme that clearly emerges from early discussions of the scope of impeachable offenses are that they are not neatly

delineated but depend on context and gravity, and that you say also that not all crimes are impeachable and not all impeachable offenses are crimes.

I want to ask you this question: Is impeachment limited only to criminal acts?

Mr. Gerhardt. Not at all. If you'll allow me, I just want to make sort of two points to clarify a couple of things. The first is I've not been paid at all. I've got three kids, one in college. It would be great, you know, but --

Mr. Johnson of Georgia. You're not being paid either to be here, right?

Mr. Gerhardt. I'm not being paid to come here. I'm not being paid to be here. It's an honor.

The second point I just want to make is that kind of follows a little bit from what you've just suggested is a concern I have, and that is if the President -- and I think that concern has been sort of overshadowed by the efforts to deflect the attention away from the purpose of this hearing.

But if the President of the United States can remove the special prosecutor, not comply with lawful subpoenas, and is immune to criminal prosecution while he's in office, that's the definition of being above the law.

Mr. Johnson of Georgia. Thank you.

And I yield back.

Ms. Scanlon. And the chair recognizes the gentleman from

Virginia for 5 minutes.

Mr. Cline. Thank you, Madam Chair.

And I want to thank our witnesses for taking the time out of their schedules, without pay, to be here today to participate in this exercise. I want to also apologize to them because this is little more than an attempt, a blatant attempt to keep on life support this ongoing impeachment by any other name. And as you can see from the audience, which is half full and the committee which is half full, I'm -- there are other things going on on the Hill today that are of importance as well. There's a hearing about the border that is down the hall. I think that is a critical issue about the humanitarian crisis going on at the border. I would like to see this committee use its jurisdiction to look into the humanitarian crisis that's going on at the border.

I see the TV cameras here, and I want to apologize to people at home who've tuned in and think they're looking at a repeat of a past hearing because, no, it's not a repeat. It's just the same pundits, journalists, and academics here opining about Volume I or Volume II of the Mueller report, not moving the ball forward at all, just really spinning the wheels of this committee, using up time and using up resources to come to no conclusion, other than the fact that the Democrats want to impeach this President but they don't have really enough to go on in the Mueller report. And there are other issues that are of primary importance facing this country that are being addressed by other committees around this Congress.

And as a member of this committee, I worked hard to get on this

committee. It is very disappointing to me that we continue just to spin the wheels of this committee.

So, Professor Eastman, I will ask you, as a former prosecutor, I was very confused by Volume II and the Mueller report, 400 pages of no charges, no recommendations for charges. Robert Mueller determined he could not exonerate President Trump of the allegations that he obstructed justice.

I've never seen this as a prosecutor. Have you ever seen a prosecutor use that line of logic?

Mr. Eastman. No, I haven't. And that's my fundamental disagreement with Part II. It reassigns the burden of proof to the object of the investigation having to prove his innocence, rather than the prosecutor having to demonstrate guilt beyond a reasonable doubt. And that violates one of our most fundamental precepts of fairness and justice in the criminal justice system, the presumption of innocence.

For him to have said that the President couldn't convince me he didn't do any of this, when his job was to determine whether he had enough information to bring an indictment or to present to this body things that would lead to either an impeachment or a post President-in-office indictment, that's what his job was. And I think that is the greatest flaw in Volume II of the Mueller report.

Mr. Cline. So in our systems, prosecutors either indict or not indict, and leave it at that.

So Mueller here is putting the burden on the President to prove his innocence instead of the burden being on Mueller to prove his guilt.



Professor Eastman, can a President obstruct justice by simply exercising his Article II powers?

Mr. Eastman. That's a close question. The reason it's close and the reason I'm hesitating and not giving you an unqualified no is if the President exercised his powers with a deliberate intent to prevent -- but we have no evidence of his intent here at all. What we do have is documented in the report itself, things like, can you clear the way to let Flynn go because he suffered enough. That's perfectly within the President's authority, and there's no even hint of bad intent there. Can you get rid of Mueller because of his conflicts of interest? No bad intent; that's clearly within the President's authority.

Mr. Cline. When Bill Clinton tried to alter witness testimony before a grand jury, that --

Mr. Eastman. That had the necessary intent and was rightly troubling. Deliberately changing an FBI report to remove an element of a crime of trafficking into classified information in order to shield the Presidential candidate I prefer, that's an obstruction of justice with the requisite intent.

Mr. Cline. Section 4 of Article II says the President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

Do you see anything in Volume II that rises to that level?

Mr. Eastman. I do not, because I don't see anything in there that

demonstrates a requisite intent that would otherwise alter the President's perfect authority to control the executive branch.

Mr. Cline. Thank you.

I yield back.

Ms. Scanlon. The chair recognizes the gentleman from Florida for 5 minutes.

Mr. Deutch. Thank you, Madam Chairman.

Thanks to all the witnesses for being here.

Mr. Gerhardt, your testimony describes several categories of formal remedies for Presidential misconduct: congressional oversight activities, impeachment, censure, election, civil suits, criminal trials.

Was Special Counsel Mueller able to pursue any of these remedies for potential misconduct by President Trump?

Mr. Gerhardt. No, he was not. He was not in the sense of being able to do anything more than issue his report.

Mr. Deutch. His investigation, just to be clear, was a criminal investigation, right?

Mr. Gerhardt. Right. It certainly was, yes.

Mr. Deutch. And if he found criminal wrongdoing by the President, could he pursue a trial?

Mr. Gerhardt. He could, or he might have thought he might be able to, but he was also -- he also plainly felt, as he said, that he was restricted by Department of Justice policy on this.

Mr. Deutch. Well, he said he was restricted by the OLC policy,

didn't he?

Mr. Gerhardt. Right. That's what I'm saying, yeah.

Mr. Deutch. Right. So Presidential misconduct uncovered by Mueller didn't come with an inherent remedy, did it?

Mr. Gerhardt. No, it did not come with an inherent remedy.

Mr. Deutch. So the Mueller report itself, the Mueller report itself was never going to hold the President of the United States accountable?

Mr. Gerhardt. That is absolutely true. And, in fact, a couple of times, a couple of key times when discussing obstruction of justice, he mentions Congress.

Mr. Deutch. Right. So if -- exactly. So, Mr. Gerhardt, if the special counsel cannot hold the President accountable, who can?

Mr. Gerhardt. The answer is nobody.

Mr. Deutch. Nobody can hold the President accountable?

Mr. Gerhardt. Well, that is to say if the President -- I may have misunderstood.

Mr. Deutch. Mr. Gerhardt, Congress can hold the President accountable, can't it?

Mr. Gerhardt. Of course. And I just --

Mr. Deutch. Right. I just wanted to clarify that.

Mr. Gerhardt. Yeah.

Mr. Deutch. Ms. Fredrickson, in your testimony, you note that special counsel couldn't exonerate President Trump, but he also couldn't proceed with a criminal remedy because he accepted the OLC

policy that a sitting President cannot be indicted.

Without those options, what did Mr. Mueller do in his report?

Ms. Fredrickson. Well, I think he did the appropriate thing, which was to refer to Congress to pursue its constitutional processes, which is, in fact, what this committee is doing now.

Mr. Deutch. Right. So you -- he conducted the investigation. He preserved evidence. He provided analysis of that. And then, as you quote from the report and as you've just said now, the separation of powers doctrine authorizes Congress to protect official proceedings including, those of courts and grand juries, from corrupt, obstructive acts, regardless of their source. Further, Special Counsel Mueller closes Volume II by stating, and I quote, the protection of the criminal justice system from corrupt acts by any person, including the President, accords with the fundamental principle of our government that no person in this country is so high that he is above the law.

Ms. Fredrickson, do you read these sections of the report as a referral to Congress to pick up where Mr. Mueller left off?

Ms. Fredrickson. Well, I certainly read it as a -- as saying to Congress that there is important -- this was -- these allegations are incredibly disturbing, indicate actions by the President and his associates that are very destructive to rule of law and that Congress needs to examine. I think it has a congressional duty to --

Mr. Deutch. Thank you very much.

Mr. Gerhardt, on May 30, President Trump said he can't be impeached because there was no crime. It appeared he was suggesting

that he would need to be found guilty in a criminal trial in order to be impeached.

Is that how impeachment works? Is that what impeachment requires?

Mr. Gerhardt. Impeachment --

Mr. Deutch. Yes or no.

Mr. Gerhardt. Impeachment does not require what the President said.

Mr. Deutch. Right. And you described, in fact, how the Framers thought of high crimes as violations of public trust and violations of a duty to our society. Some have argued the President can't commit the crime of obstruction of justice when he's exercising his Article II powers. We've heard that here today.

Regardless of the merits of that argument in a criminal trial, isn't the corrupt use of power exactly the sort of abuse that the Framers and historical Presidents show qualified as a high crime?

Mr. Gerhardt. Absolutely. That's why we have it.

Mr. Deutch. Right. So let me finish with this.

Professor Gerhardt, we heard that impeachment proceedings have begun without any formal vote for impeachment. Who has the power to set the proceedings for this body, for Congress to implement a constitutional power such as impeachment?

Mr. Gerhardt. Congress.

Mr. Deutch. Right. And do the House rules require a formal authorization of an impeachment inquiry?

Mr. Gerhardt. Absolutely not. It doesn't say that in any place.

Mr. Deutch. Professor Gerhardt, does the United States Constitution require a formal authorization of an impeachment inquiry?

Mr. Gerhardt. Absolutely not. The words "impeachment inquiry" are not in the Constitution.

Mr. Deutch. Thank you.

I yield back.

Ms. Scanlon. Thank you.

The chair recognizes the gentleman from Louisiana for 5 minutes.

Mr. Johnson of Louisiana. Thank you, Madam Chair.

Thank you to the witnesses for being here.

Mr. Gerhardt, over here on your right. Yeah, sorry. We've got a big committee.

You said in a recent interview with The New Yorker magazine that, quote, if the President has misled people, unquote, then it could be the basis for impeachment.

President Obama made a statement that became rather famous regarding ObamaCare, and he said, quote, if you like your healthcare plan, you can keep it, unquote. It was famously called the lie of the year by PolitiFact.

So I don't mean this to be flippant. I want to ask you a question about your intellectual consistency. Is that an impeachable offense?

Mr. Gerhardt. I would not say so, and it's partly because I think the President made a mistake. Acting in good faith is pertinent to any impeachment inquiry.

Mr. Johnson of Louisiana. Well, but didn't you just explain in your last set of answers here that a violation of the public trust is an impeachable offense? I just heard you say that a few minutes ago.

Mr. Gerhardt. That's true. Absolutely true.

Mr. Johnson of Louisiana. So is that not a violation of the public trust when half of America relied upon that great promise?

Mr. Gerhardt. I don't think I would say it violated public trust. I think you need two things at least. One is you need to have -- be doing a bad act. That's one of the things required. But the other is you need to have bad intent. I think there are times when Presidents obviously are mistaken. I don't think that was a deliberate falsehood at all. I think that an inquiry would be justified any time that this committee or the House has concern about whether or not the President had said or done something with bad faith and that was a bad act.

Mr. Johnson of Louisiana. Okay. In a 1999 article that was entitled, The Lessons of Impeachment History, you quoted Alexander Hamilton in Federalist 65, and you wrote, quote, in the Federalist No. 65, Alexander Hamilton warned that impeachments often would begin in a partisan atmosphere. Consequently, Hamilton counseled the further along an impeachment proceeded, the more that Members of Congress needed to find a nonpartisan basis on which to resolve the proceedings, unquote. That's what you wrote.

Mr. Gerhardt. Yes.

Mr. Johnson of Louisiana. The Mueller report, of course, has been out for almost 3 months. As of June 30, there were 79 elected

Democrats calling for impeachment and zero Republicans. Our friend, Representative Amash, is now a registered Independent.

So the question is, if this body were to take Alexander Hamilton's advice, shouldn't impeachment be off the table at this point because there's no way that we find a nonpartisan basis to proceed?

Mr. Gerhardt. The answer is no. And part of the reason for that is because if one party decides to obstruct something, that is to say, doesn't agree, can't find common ground, that can't hamstring the institution.

Mr. Johnson of Louisiana. Wait a minute. So are you suggesting the Republicans are obstructing this now?

Mr. Gerhardt. I'm sorry if that's overstated, but the point is --

Mr. Johnson of Louisiana. It's greatly overstated. Thank you for acknowledging, yes.

Mr. Gerhardt. But the point is that if -- it may or may not begin in a partisan atmosphere. You need fact-finding. You need investigation to determine the evidence and the gravity.

Mr. Johnson of Louisiana. That's what we had with the Mueller report, right? Two years and \$30 million and endless resources to do this. Didn't we have that?

Mr. Gerhardt. Congressman, the Mueller report does not bind this committee. It does not bind --

Mr. Johnson of Louisiana. No, but that was begun in a nonpartisan manner. He was famously the objective arbiter of all this.



Let me move on.

Mr. Gerhardt. I don't think he was the supreme arbiter of this.

Mr. Johnson of Louisiana. All right. Well, I mean, we've known your true colors now when you say we're obstructing, so I guess --

Mr. Gerhardt. I'm sorry for that phraseology. But the point is that it can become a strategy, let's say, to be able to prevent bipartisanship by simply choosing not to go along if there are other political motivations for that.

Mr. Johnson of Louisiana. I got it. I'm just saying, based upon your earlier scholarship, Alexander Hamilton would want this farce to end. Okay.

Ms. Fredrickson, on March 22, 2019, your group, the American Constitution Center, issued a press release entitled, quote, Mueller Report, How far up the chain did the Trump campaign's efforts to conspire with Russia go? It quoted you. And you said, quote, the question isn't whether members of the Trump campaign conspired with Russia to sway the 2016 elections. We already know they did, unquote.

As you may know, conspiracy to commit an offense or to defraud the U.S. is a Federal crime under 18 U.S. Code, Section 371. I just want to know if you can remind this committee which members of the Trump campaign were charged and prosecuted for conspiring with Russia.

Ms. Fredrickson. Well, and first, I'd like to say that I think it's unfortunate that so many on your side of the aisle don't seem to want to get to the bottom of what happened in terms of the Russian interference in our election.

Mr. Johnson of Louisiana. To the contrary. To the contrary. Just answer the question.

Ms. Fredrickson. And that all of our intelligence agencies have indicated that there was sweeping attacks on our elections, that they were renewed in 2018 with some impact, and that there are anticipated attacks in 2020.

Mr. Johnson of Louisiana. So you disagree with the Mueller report's findings, Volume I?

Ms. Fredrickson. I think there is much more work for this Congress to do to understand what Russia has attempted, what they were successful at, and what they're planning.

Mr. Johnson of Louisiana. I got it, but I'm out of time. But just to follow up on that. So with all the vast resources, the \$30 million, the endless supply of investigators, the 500 witnesses, everything that the Mueller report had, did, and was involved in for 2 years, you think there's yet more for the people on this --

Ms. Fredrickson. I do.

Mr. Johnson of Louisiana. -- dais to dig into, right?

Ms. Fredrickson. I do. I think there were many people who had destroyed evidence. There were people who Mueller was not allowed to interview. And so I do think there's -- I mean, look, I'm deeply worried about the integrity of our elections, and I hope Congress is as well.

Mr. Johnson of Louisiana. Well, I'm deeply worried about the integrity of your organization.

Ms. Scanlon. The gentleman's time has expired.

Mr. Johnson of Louisiana. I'm out of time. I yield back.

Ms. Scanlon. The chair recognizes the gentleman from Rhode Island for 5 minutes.

Mr. Cicilline. Thank you, Ms. Fredrickson, for your last comment. I know there are many on this committee who share your concern and frustration with the obstruction from our colleagues on the other side of the aisle. And I think if Alexander Hamilton, great Founder who my friend mentioned, were alive, they would be appalled, frankly, at the conduct of this committee and their unwillingness to take on these very serious issues.

So I thank the chairman for convening this hearing on this very important question.

The hearing is entitled, Lessons from the Mueller Report: "Constitutional Processes for Addressing Presidential Misconduct."

Ms. Fredrickson, could you tell me what is the principle constitutional process available for addressing Presidential misconduct?

Mr. Eastman. I'm sorry. Was that addressed to me?

Mr. Cicilline. No, it was addressed to Ms. Fredrickson.

Ms. Fredrickson. Well, I mean, there -- Article I lays out Congress' authorities. And they're multiple, but certainly the legislative power includes oversight as an essential part of it. But also in Article I is the power to impeach. Those tools are not alternative. They're --

Mr. Cicilline. And is it fair to say impeachment is the principal process to address Presidential misconduct?

Ms. Fredrickson. I think it's one of the processes. I don't think that -- I think there's more of a continuum. As I mention in my testimony, during the Nixon -- during the Watergate hearings, there was actually -- almost a year went by before there was a referral to the full House for a vote on the articles. So I think it's hard to separate, I would say.

Mr. Cicilline. Okay. Professor.

Mr. Gerhardt. I agree. I think that I agree with everything she just said. I believe that it is completely within the discretion of this committee and the power of this committee to be able to, not just read the Mueller report, but to ask the very reasonable question whether we need to know anything else in order to undertake the constitutional responsibilities we have.

Mr. Cicilline. And related to that, many of our -- many of our -- Congress' ability to hold the President accountable rely on the executive branch providing Congress with information that it needs to legislate, to conduct oversight, or to consider remedies like impeachment or censure.

Could you begin, Ms. Fredrickson, to describe generally what the Supreme Court has said about Congress' power to conduct investigations and to collect documents and testimony, including by use of subpoena, how the Court has described our power in that context?

Ms. Fredrickson. The Court has been -- has used very sweeping

language to describe Congress' power. Again, it's inherent and the legislative power is the power to conduct oversight and investigations.

Mr. Cicilline. And the Court has, in fact, said the power to secure needed information is an attribute of the power to legislate, which is a core function of Congress.

Ms. Fredrickson. Well, exactly. I mean, Congress would not know how to respond to statutory gaps if it can't examine what the statutory gaps are.

Mr. Cicilline. And the perils of Congress being unable to do its constitutionally required work if an executive branch decides to prevent witnesses from coming forward or to instruct witnesses not to cooperate or to not make the documents available is significant.

Professor, would you speak a little bit about, Professor Gerhardt, what the consequences of that would be for Congress? I mean, we have a President, for example, who's told -- said publicly that he is going to fight all efforts by Congress to get information, that he's going to tell witnesses not to come and defy subpoenas. What are the implications of that?

Mr. Gerhardt. Well, they're not good. I mean, the implications of that is, at the very least, Congress should be concerned. Obviously, this committee should be concerned. And this committee is acting perfectly reasonably to consider what evidence -- I don't know if this has been put forward in the report or anywhere else. If I may, can I read one sentence from the report from Mr. Mueller that just goes along these lines?

He says, with respect to the President -- with respect to whether the President can be found to have obstructed justice by exercising his powers under Article II of the Constitution, we concluded that Congress has authority to prohibit a President's corrupt use of his authority in order to protect the integrity of the administration of justice.

Congress has that authority. This committee has that authority.

Mr. Cicilline. So we have had a number of examples, both with respect to the White House Counsel Don McGahn and the former White House Communications Director Hope Hicks, where the White House asserted something called -- that they claim is absolute immunity, which is basically our right to prevent you from hearing anything relevant from these witnesses.

Would that sort of obstruction that we're seeing in an effort to prevent witnesses from appearing before the committee or producing documents in and of itself be an appropriate basis for an article of impeachment against a President, if proved?

Yes, Ms. Fredrickson.

Ms. Fredrickson. Well, I think if you look again at the Nixon impeachment, you'll see that that exact kind of obstruction formed one of the articles in that.

Mr. Cicilline. And, Professor Gerhardt.

Mr. Gerhardt. Clearly, the Constitution allows this body and this committee to consider whether or not obstruction's happened. It's just important to really emphasize that it doesn't have to be a

technical violation of a statute. It still may be a problem if the President obstructs justice in any way.

Mr. Cicilline. Thank you.

I yield back, Madam Chair.

Ms. Scanlon. The chair recognizes the gentleman from California for 5 minutes.

Mr. Lieu. Thank you, Madam Chair.

Ms. Fredrickson, you were asked earlier a question about Russia. So for Special Counsel Mueller's investigation, 34 individuals were indicted. Isn't that correct?

Ms. Fredrickson. Yes, that's correct.

Mr. Lieu. And at least eight have either pled guilty or been convicted. Isn't that correct?

Ms. Fredrickson. That's correct.

Mr. Lieu. And the Mueller report identifies that Paul Manafort gave internal polling data to the Russians. Isn't that correct?

Ms. Fredrickson. That's correct.

Mr. Lieu. And the Mueller report also shows numerous contacts between Russians and Trump campaign officials. Isn't that correct?

Ms. Fredrickson. That's correct.

Mr. Lieu. And a fair reading of Volume I of the report would be that the Trump campaign knew about the Russian interference, welcomed it, embraced it, gave them internal information, and knew it was going to help Donald Trump win the election. Isn't that correct?

Ms. Fredrickson. That is correct.

Mr. Lieu. Okay. Let's move to Volume II now which focuses on obstruction of justice. In the Nixon impeachment hearings, the first article of impeachment, what was that on? It was obstruction of justice, wasn't it?

Ms. Fredrickson. It was obstruction, yes.

Mr. Lieu. All right. Obstruction of justice, certainly under the Nixon hearings, was important enough to be the very first article of impeachment. So if there was obstruction of justice related to Donald Trump, that would also certainly qualify as important enough to be an article of impeachment if it was established, correct?

Ms. Fredrickson. It certainly could be.

Mr. Lieu. Okay. Let me talk to you now, Professor Gerhardt, about the obstruction we're seeing from the Trump administration to congressional oversight investigations. And it's not just on the Mueller report; it's on everything. So we want to know, for example, why is the Trump administration supporting the lawsuit to eliminate healthcare coverage for Americans with preexisting conditions? We can't get that information. We wanted to know why did Trump officials lie about the census? We couldn't get that information. We can't even get witnesses simply to show up here even under subpoena.

And the Trump administration is asserting something called absolute immunity. No court has ever found that, correct?

Mr. Gerhardt. No court has ever found that the President has kind of absolute immunity you're talking about, no.

Mr. Lieu. Okay. So given the assertions of this sort of fake



immunity, do you agree that if these witnesses don't show up, they would be subject, not just to the lawful subpoena, but also to any potential other consequences, and that they themselves would be liable for not showing up?

Mr. Gerhardt. Absolutely. And the committee and the chair have the power to issue subpoenas. Subpoenas are lawful orders. And it's a question of whether or not they're complying with the law when they're considering whether or not to comply with the subpoena.

Mr. Lieu. Okay. And then let's talk specifically again about obstruction of justice. The Mueller report lays out multiple instances of obstruction of justice. And then the special counsel goes, all right, here's three elements to establish obstruction of justice. And in multiple cases, he shows that there's significant evidence of all three elements. Isn't that correct?

Mr. Gerhardt. Right.

Mr. Lieu. And on the issue of intent, you can certainly infer intent from the very words of Donald Trump. Isn't that right?

Mr. Gerhardt. Well, you can infer intent from words, from circumstances, from context.

Mr. Lieu. And when Trump fired Comey, he stated that he was receiving great pressure from the Russia investigation and that that pressure's been taken off. That's certainly evidence of intent, isn't it?

Mr. Gerhardt. It's perfectly reasonable to wonder about what's going on when he says something like that, yes.

Mr. Lieu. When the President goes on national TV and says he fired Comey because of the Russia thing, that's certainly evidence of intent, isn't it?

Mr. Gerhardt. It could be evidence of intent, absolutely. It's certainly the statement of something that sounds like obstruction.

Mr. Lieu. When the President orders one of their senior officials to create a fake document, that's certainly evidence of intent?

Mr. Gerhardt. I'm sorry. I missed that.

Mr. Lieu. When the President orders one of his officials to create a fake document, that's certainly evidence of intent, isn't it?

Mr. Gerhardt. Yeah, that's -- that's hugely problematic. And, one, it's obstruction. And I might also go further to say that one of the consequences of vesting the President with so many entitlements, such as absolute executive privilege, absolute immunity, means that if there's any delay that relates to something criminal 4 years or longer, what happens to the evidence? That's a tremendous concern. And so that's why I have argued that I don't think the President's immune to the criminal process or other processes.

Mr. Lieu. And in the Mueller report, Special Counsel Mueller doesn't even put out any burden of proof. He doesn't shift the burden. He simply says, because I could not indict under the DOJ policy, I'm not going to make that prosecutorial judgment. Isn't that right?

Mr. Gerhardt. That's correct.

Mr. Lieu. I yield back.

Ms. Scanlon. The chair recognizes Mr. Raskin for 5 minutes.

Mr. Raskin. Madam Chair, thank you very much.

Professor Gerhardt, let me start with you. Why does the Congress have the power to impeach the President but the President doesn't have the power to dissolve the Congress or to impeach individual Members? Why does the Congress have the power to impeach justice in the Supreme Court but they don't have the power to remove Members of Congress?

Mr. Gerhardt. Well, that's all part of checks and balances. And, of course, Congress has the power, in part, because Congress is accountable politically.

Mr. Raskin. Yeah.

Mr. Gerhardt. And the idea is clearly behind those restrictions and is, as you well know, the effort to actually prevent the President or prevent the COURT from becoming all-powerful.

Mr. Raskin. Do you agree with the rhetoric of coequal branches? Every time the President tramples another constitutional right or value or principle of separation of powers, one of my colleagues would get up and say, we're coequal branches, Mr. President. Please pay attention to us.

Do you agree with that?

Mr. Gerhardt. I do agree.

Mr. Raskin. Before you go on, let me just say I disagree with it, and I want to tell you why. And I don't think it's just because I'm a Member of Congress now. When I was a professor of constitutional law, I disagreed with it. That's not the way I see the Constitution.

The Preamble starts with, We, the people, in order to form a more perfect union, and so on, established the Constitution. The very next sentence says, All legislative powers are vested in the Congress of the United States.

Then you get pages of description of what the powers of Congress are, and they are comprehensive. We have the power to declare war, to regulate domestic commerce --

Mr. Gerhard. Right.

Mr. Raskin. -- international commerce. We have the power to impeach. We have the power to control the seat of government, post office, copyright, you name it. All of it's in there.

Then for the President, the President is the Commander in Chief in times of actual conflict, and his job is to take care that the laws are faithfully executed.

So the reason I ask the question about impeachment is, don't we have the power to impeach the President because this is a representative democracy and Article I puts Congress first and the President works to implement the laws that we've adopted?

Mr. Gerhardt. I think what you've said makes imminent sense. And I don't want us to be talking past each other.

Mr. Raskin. Yeah.

Mr. Gerhardt. I think that each branch, of course, is vested with certain powers, and no other branch can interfere or undermine those powers.

Mr. Raskin. Right. But I think at least it's constitutionally

important to note that it's Congress that has the power to impeach everybody else and they don't have the power to impeach the Congress --

Mr. Gerhardt. Absolutely right.

Mr. Raskin. -- because we are elected by the people.

Mr. Gerhardt. That's correct.

Mr. Raskin. I want to ask you, Ms. Fredrickson, a question about impeachment, about law and politics. There's been a lot of confusion in the country about this. Some people say, well, look, it's very clear that there were 9 or 10 episodes of Presidential obstruction of justice. It's very clear from everything that the special counsel wrote and from what he did in sending two letters of protest to the Attorney General for misstating and distorting the contents of the report and for -- from his having a press conference to come out and say the reason that we didn't indict the President was because of the DOJ policy that we can't indict the President.

So some people are saying it's very clear there's Presidential obstruction of justice. Why doesn't Congress just go ahead and impeach? And then others say, well, you know, it's not just a legal question. It's a political question because it's invested with Article I, with Congress. It's not in the courts. The courts don't have the power to do it. Congress has to do it.

And so Members of Congress have to take into account, with everything else we're doing, with the border crisis, with trying to lower prescription drug prices. We've got to think about public opinion. We've got to think about our districts.

Are those political considerations really proper and appropriate in terms of what Congress should think about? Should we be trying to think about this just as judges or should we think about it in the context of everything else we're trying to do?

Ms. Fredrickson. I think Professor Gerhardt did an excellent job of explaining the language in the Constitution, what are high crimes and misdemeanors. And they're not necessarily crimes. They could be crimes, but they could be other types of activity that might be fully lawful but might have really harmed the fabric of the Nation. And so it's a judgment call, and it's one that Congress has to make, among all of its other responsibilities.

Mr. Raskin. Okay. Very good.

Professor Gerhardt, let me come back to you. What about the role of public opinion here? Some people have said, well, only 19 percent of the people supported impeaching Richard Nixon before the impeachment hearings got started. Forty-six percent of the people support impeachment today, which is extraordinary given that we haven't formally launched impeachment inquiry. He's never reached 50 percent in the polls. He's the only President since World War II who never has gotten up to 50 percent in his approval ratings.

Some people say, take that into account. The President has committed high crimes and misdemeanors. He's a sitting duck, and we should take that into account. Others say public opinion is irrelevant. And lots of Republicans, the majority of the Republicans still oppose it. We should take that into account instead.

What is the role of public opinion in this decision?

Mr. Gerhardt. Well, it's a great question. I think the role of public opinion is something, of course, that you should take -- you're fully entitled to take into account. It makes imminent sense for that to happen. At the same time, there are fiduciary duties within each Chamber of Congress to consider how to exercise their respective powers, and public opinion, hopefully, will support that. That's what Congress, of course, hopes for.

But as in the Watergate situation, as you just mentioned, it took a year at least to be able to figure out through an investigation, with no help from the President, on whether or not he had committed any kind of misconduct. And it's entirely possible that public opinion wouldn't necessarily support Congress or the House or any particular -- as it moves along, but the evidence might inform public opinion and it might turn around, just like it did with President Nixon.

Mr. Raskin. Finally, I have a yes-or-no question. Does anyone here think that the -- that President Clinton should have been impeached for what I consider a low crime and misdemeanor, lying about sex? Does anybody think that he -- that the House was correct in impeaching him?

Mr. Eastman. I think he was. It was not a low crime. It was --

Mr. Raskin. So yes, you believe that.

Mr. Eastman. It was obstruction of justice.

Mr. Raskin. Let me follow up with you then, Mr. Eastman.

Ms. Scanlon. Time's up.

The chair recognizes Mr. Armstrong for 5 minutes.

Mr. Armstrong. Thank you.

And I think that line of questioning is interesting in a lot of different reasons. One, I think that's where you get the distinction between political and legal, because I think lying under oath is lying under oath, and it's a political distinction as to whether or not it's a minor crime or a major crime, so -- and I think Mr. Raskin and I could have long esoteric debates about this issue in a different format.

But, Professor Eastman, just I want to go to the obstruction stuff because we were just talking about it a little bit. Do you think any of the 10 potential episodes of obstruction outlined in the Mueller report constitute obstruction of justice?

Mr. Eastman. I do not, because I don't think any of them demonstrate the necessary intent to obstruct. I think they are all well within the President's Article II authorities.

Mr. Armstrong. Well, and I have two different questions about that, and one starts with the Article II authority. And, I mean, so when you're -- I mean, the answer is any President can't be guilty of obstruction just for exercising their Article II authority. I mean, otherwise, we'd get into this whole separation of powers, and there's -- I mean, we all want the President treated like everybody else because that makes everybody sound, I mean, like it is, but there's actually real sound separation of powers and policy reasons why that's not the case.

So can you elaborate on that just a little bit?



Mr. Eastman. I agree. And I think the two OLC memos that I focus on extensively in my written testimony outline why that's the case. The President -- and I'll go back to something Mr. Raskin said. The powers given to the Congress are enumerated. The power given to the President is unenumerated. It is the executive power, the entirety of it. And the Framers of the Constitution did that deliberately because the system they had before that under the articles of confederation -- confederation was not working because we did not have an energetic executive who could execute the law both domestically and deal with anything that arose on the international scene. That's not a part of a legislative power; that is a core executive power.

Mr. Armstrong. Well, and then that goes to why that memo exists. I mean, without that memo in place and the President getting indicted, can you explain, I mean, where we end up on separation of powers and how that would affect, I mean, essentially governing structure of the United States?

Mr. Eastman. It would be fundamentally altered. Any individual prosecutor in any State or in any Federal U.S. Attorney's Office could effectively unravel the results of an election. And to think that those processes themselves won't become politicized is, I think, naive in the extreme. And I think that's why the OLC memos, both under the Nixon administration and under the Clinton administration -- I want to point out. This is a bipartisan conclusion by different administrations by the Office of Legal Counsel.

Mr. Armstrong. Now, and I want to go back to now let's assume

the OLC memo doesn't exist. Does your answer change on obstruction of justice?

Mr. Eastman. No. No. And this goes back to the earlier comment I made about I think the fundamental flaw in the analysis in Part II of the report is that it put the burden on the target of the investigation to prove his innocence, rather than the normal prosecutorial function which is to lay out a case to a grand jury -- in this case, the grand jury would be the House -- to lay out a case of why I have probable cause to bring an indictment that would lead me to think I could get, you know, proof beyond a reasonable doubt.

The standard is not criminal, I agree with Professor Gerhardt on that, but it also rises to the level of impeachment. And I don't think anything here, particularly in comparison to things we've witnessed recently in recent administrations, I don't think anything gets close to that standard.

Mr. Armstrong. Well, and so there's been a lot made -- and I practiced law in Federal court and done criminal law in my life, and one of the things is we all understand you can have obstruction even if the underlying crime doesn't exist. There is a legal way that occurs, and that is actually true. But intent becomes a huge part of this conversation. It's also true that it's very rarely charged when you find out there's not an underlying offense, and one of the reasons is is illegitimate purpose and legitimate purpose.

And under the best or worst reading of any of these 10 obstruction charges, can you -- I mean, can you find any one of those that doesn't

have a legitimate purpose?

Mr. Eastman. You know, I don't find any of them that don't have a perfectly legitimate purpose, and it's a much more plausible purpose than any of the other stories that are being spun out to try and prove that there was an illegitimate purpose.

Mr. Armstrong. Thank you.

With that, I yield back.

Ms. Scanlon. The chair recognizes the gentlewoman from Washington for 5 minutes.

Ms. Jayapal. Thank you, Madam Chair.

Ms. Fredrickson, let me start with you. In his written testimony, Dr. Eastman argues that a sitting President is immune from prosecution and that, therefore, impeachment is the only constitutional remedy for Presidential misconduct.

Do you agree that a President is immune from prosecution?

Ms. Fredrickson. No, I don't believe so. I think, you know, again, just Professor Gerhardt laid out, I think rather extensively, the arguments with the OLC memo. But, you know, I would say, however, that there is something interesting about this idea of sort of the structural arguments that make the President immune. That is it's too cumbersome on his or her, hopefully someday, responsibilities and that, therefore, we just have to then find not in the text and not in the historical information an immunity for the President.

If that were the case, we should be able to find inherent in that text as well an automatic tolling of statute of limitations for criminal

prosecutions. You should really need to pass -- have to pass legislation to do that. So I think there's -- it's certainly very disputed that the President is immune. I think there have been many scholars who have contested that, and certainly those who would also indicate that perhaps there can't be a prosecution but there could be an indictment. Would an indictment actually be that cumbersome for a President?

So I think they are very important questions. Again, I think it's indicative of how important it is for Congress to continue to examine the evidence underlying the Mueller report.

RPTR JOHNSON

EDTR ZAMORA

Ms. Jayapal. I mean, you've sort of answered this, but let me ask the question anyway for anyone who might be listening that hasn't been following.

Can a President violate Federal criminal law through his exercise of Article II powers?

Ms. Fredrickson. Oh, absolutely.

Ms. Jayapal. Okay. So, for example, could -- could a President violate Federal bribery statutes if he or she were to offer a pardon to a witness in exchange for refusing to cooperate with a Federal investigator?

Ms. Fredrickson. Yes.

Ms. Jayapal. Okay. And, Professor Gerhardt, do you agree with Dr. Eastman that the only constitutional remedy for Presidential misconduct is impeachment? Just briefly.

Mr. Gerhardt. Not at all. No, he and I respectfully disagree on that. I tried to lay out in my written statement a variety of other processes for handling or addressing Presidential misconduct. Impeachment obviously is one, but there may be others, depending upon the severity and gravity of the offense and what else this committee determines through legitimate investigation.

Ms. Jayapal. So let me turn to another subject, and I'll stay with you, Professor Gerhardt. In *Nixon v. Fitzgerald*, the Supreme

Court held that the President is entitled to absolute immunity from damages liability based on his official acts. Anticipating concerns that that finding would leave Nixon -- it would leave the Nation without sufficient -- and these are quoted words -- without sufficient protection against misconduct by the Chief Executive, and quote, the Court articulated several formal and informal checks on Presidential misconduct in addition to the constitutional remedy of impeachment.

And the Court described those checks as constant press scrutiny, vigilant oversight by Congress --

Mr. Gerhardt. Yes.

Ms. Jayapal. -- the desire to earn reelection, and the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

So can you elaborate on this -- this concept of informal checks?

Mr. Gerhardt. I'll try to as briefly as possible. So there are things that are spelled out in the Constitution that clearly are formal mechanisms for addressing Presidential misconduct. The quote obviously sort of mentioned those. Among them are the things you just mentioned as well, impeachment, public opinion among them. Congressional oversight's a key element of that.

But the informal checks are things that are not done by government or -- or done in any kind of official way, but they nevertheless might constrain a President. So they would include some of the things that you just mentioned.

For example, concern about maintaining influence; you know,

popularity is important for a President to succeed in office. At the same time, Presidents are in that unique position of thinking about what kind of influence or impact they'll have on the office itself or the Constitution over time. And those things might constrain them as well.

Ms. Jayapal. And let's talk about press for a second. Because President Trump has repeatedly referred to the press as the enemy of the people, but the Court in Fitzgerald named the press as a really important check on the Presidency.

Mr. Gerhardt. Yes.

Ms. Jayapal. So when you have a President who openly encourages violence against the press, praised Representative Gianforte for assaulting a reporter, regularly attacks judges who rule against his policies, and refuses to release his tax returns, what effect does that have?

Mr. Gerhardt. A terrible effect. And that's something, of course, to take into account as well. But the point you're making, I think, is a very sound one, that the press serves a very important function in this country of trying to put a spotlight on government and trying to actually allow for transparency in government. And efforts to obstruct that -- I hope I'm using the word correctly in that context -- I think would be matters of great concern.

Ms. Jayapal. Thank you, Professor.

I yield back.

Ms. Scanlon. Okay. The chair recognizes Mrs. Lesko for

5 minutes.

Mrs. Lesko. Thank you, Madam Chairman.

I have a question for Professor Eastman. And it is basically, Professor Eastman, did the Office of Legal Counsel memo that holds a sitting President cannot be indicted stop Mueller from ending his report with a suggestion that President Trump should be indicted for obstruction of justice? Was there anything preventing him from doing that?

Mr. Eastman. No, there was not.

Mrs. Lesko. And I think this has been asked before maybe, because I was in the other room in the other committee actually being a witness. But, you know, when I went -- have read through the Mueller report several times now, and what popped out to me was the thing about corrupt intent, that there was no underlying crime, no corrupt intent. I don't know if you have anything to add on that, how it would be difficult, is what Mr. Mueller said, my reading, to prove corrupt intent when there's no underlying crime.

Mr. Eastman. Well, it's difficult. I agree with Professor Gerhardt that it's not impossible. But we normally look at when there are two explanations for inaction, one's perfectly legitimate and the other a stretch to get to corrupt intent. We tend to Occam's razor, take the short path to say the legitimate one is probably the right one.

Mrs. Lesko. Well, good. And, Mr. Eastman, since I wasn't here the whole time, is there anything that hasn't been said that you would



like to add for our record?

Mr. Eastman. I think the bottom line conclusion of both OLC memos that I think is absolutely correct is precisely why they came to the conclusion that a sitting President, while he remains President, cannot be indicted, that the constitutional remedy is impeachment, because it puts the issue into a body that is itself politically accountable. And I think that is the most important piece to take away this.

If the members of this committee and of this House truly believe that the things that Mr. Mueller has identified rise to the level of high crimes and misdemeanors, you would be being derelict in your duty not to bring impeachment charges. So bring it on.

I don't think there's anything in here -- and I don't think the American people will agree that there's anything here that rises to that level.

The political accountability on that works both ways. If you don't bring actions against a President who has committed high crimes and misdemeanors, you will be held to political account. If you do pursue investigations on things that do not remotely rise to that level, you will also be held to political account. That's the beauty of our system, and I think that's why the OLC memos reach the conclusion that they do.

Mrs. Lesko. Thank you, Mr. Eastman and the other witnesses.  
And I yield back my time.

Ms. Scanlon. Thank you.

I recognize myself for 5 minutes.

Professor Gerhardt, you know, the purpose of these hearings are not just to educate Members of Congress but also the general public on topics they may not have had the opportunity to look at. So I wanted to take a couple minutes to tap your expertise as a constitutional scholar and talk about what the authors of the Constitution considered to be impeachable offenses.

We had a little bit of quotation of Alexander Hamilton in the Federalist papers earlier, but I wanted to focus on his declaration that impeachable offenses are, and I quote, those offenses which proceed from the misconduct of public men, or in other words, the abuse or violation of the public trust.

Could you comment on what the Founders of our country meant to be impeachable offenses and any examples they discuss that might be relevant to our inquiry today?

Mr. Gerhardt. Well, I'll try, certainly. Alexander Hamilton obviously gets it right; that is to say his formulation or his understanding of the scope of impeachable offenses is very consistent with what we learn from the Constitutional Convention and what we can infer from the structure of our Constitution.

So the core elements or core, I guess, paradigms of impeachable offenses become things like abuse of power, things like a breach of public trust, things that seriously injure the republic.

So those won't be limited just to technical crimes. They'll be limited to the kinds of unique things that a President is able to do.

He has the pardon power. But in the Constitutional Convention, it's mentioned that if the pardon power is used to shield somebody with whom the President is in criminal conspiracy with -- I'm paraphrasing -- that's an impeachable offense. And I think almost everybody would agree that that would be an abuse of power.

And so the terms that Mr. Hamilton used and the terms that others such as Justice James Wilson used in describing the scope of impeachable offense set up categories, if you will, set up the kinds of things that would have to be proved in order to constitute an impeachable offense.

Ms. Scanlon. Thank you.

Turning to the history of impeachment proceedings in this country, and you may have touched on this a little bit already. Given what you know of the facts laid out in the Mueller report, would it be appropriate for us to draw any parallels between the current moment and previous impeachment inquiries?

Mr. Gerhardt. Absolutely. The most obvious is obstruction of justice. There was an obstruction of justice article approved by the House Judiciary Committee against President Nixon.

I will hope that that's not serious.

Ms. Scanlon. Happens all the time.

Mr. Gerhardt. Okay. There was an impeachment article approved by the House against President Clinton.

It's well settled that obstruction of justice may provide a basis for Presidential impeachment. It's Presidential misconduct of the worst kind, invading, undermining the other branches as they try to

exercise their legitimate powers to try and make -- try and determine the President's accountability.

Ms. Scanlon. And we've heard a little bit of discussion about whether or not this particular President intended to obstruct justice. You have reviewed the Mueller report, right?

Mr. Gerhardt. I've read it, yes.

Ms. Scanlon. And you know that the President refused to answer any questions regarding the allegations of obstruction of justice, right?

Mr. Gerhardt. Right.

Ms. Scanlon. So we wouldn't have those words from his mouth unless he tweeted them.

Mr. Gerhardt. That's correct. And it's important to remember, the Mueller report doesn't just not bind this committee or the House, it doesn't displace this committee or the House. So the committee certainly has the authority to inquire into these things.

Ms. Scanlon. So I come to this proceeding with really profound concerns that misconduct by this President isn't limited to some ill-advised tweets but that his defiance of congressional subpoenas and the Constitution and the rule of law places our country in jeopardy. Call me old-fashioned, but I strongly have the opinion that the highest duty of the President is to serve the public and not to serve himself or to see how much he can get away with.

Can you speak to, you know, what our oversight or impeachment or other powers have to do with, you know, reigning in an administration

that might be defying the rule of law?

Mr. Gerhardt. They have everything to do with trying to make sure that a President is accountable under law and pursuant to the Constitution. And so I think that there -- I won't go into a long line of hypotheticals, but the important thing to understand is that it's perfectly reasonable for the committee to be able to inquire into the gravity of things, to look at evidence. And if that evidence takes them to -- if that evidence supports approval of Articles of Impeachment, that's your job to consider.

There may be a variety of different processes, and we talked about them, that may be appropriate for holding a President accountable for misconduct, and we shouldn't lose sight of all of those different things. I think all those different things empower the committee to do what it's doing.

Ms. Scanlon. Thank you.

With that, I would recognize the gentlewoman from Texas, for 5 minutes.

Ms. Garcia. Thank you, Madam Chair. And thank you to the witnesses for being here this morning.

And let me just say that, for me, it's refreshing to hear some good dialogue about the important role of Congress and the role that we have in this process, not only in oversight, as has been laid out by Professor Gerhardt, but in continuing to look at this, and Ms. Fredrickson, for you to also outline that these things do take time.

I know that the ranking member made a show of talking about the

show that he thinks this is and bringing out the popcorn, and if we're going to do an impeachment, we ought to just say it, and this is an impeachment want-to-be -- inquiry want-to-be. But we've done the opposite and met the first day -- or the second time we met and immediately gone and said it's time for impeachment, here's what we're going to do. Everybody would have said we rushed to judgment one day. So it's about striking a balance and making sure that we're thorough and that we look at everything.

And one thing that has really concerned me as a lawyer and as a former judge -- and, Professor Gerhardt, I'll ask you the question, is this whole notion of the absolute immunity. And it struck me that you said that no court has ever opined on that.

Mr. Gerhardt. Right.

Ms. Garcia. Is that because no President has ever exerted this complete absolute immunity?

Mr. Gerhardt. Immunity to criminal process?

Ms. Garcia. Yes, sir.

Mr. Gerhardt. Not yet.

Ms. Garcia. Or even from testifying. If you recall, I was -- I, for one, was totally frustrated when Hope Hicks a couple of weeks ago came to -- to testify, and she walks in with, I forget, four or five lawyers, they objected to just about every question we asked. I think they objected like about 155 times. And it was anything having to do from the beginning of her -- the minute she walks in the White House, that she has absolute immunity and she can't testify about it.

Mr. Gerhardt. No --

Ms. Garcia. And it just seemed to me to be one of the most ridiculous assertions of any kind of privilege.

Mr. Gerhardt. That would be an abuse of privilege, in my opinion. So privilege, executive privilege, attorney-client privilege, neither of these protects anyone, including the President or anybody that works for the President, to engage in criminal activity.

You wouldn't have the privilege to maintain the confidentiality of that. In fact, the privilege is maybe not just waived but doesn't apply to conversations that -- or actions that may relate to criminal activity.

Ms. Garcia. But in her case, it was more than just criminal -- potential criminal activity.

Have you read the transcript? I mean, it was even talking about her job.

Mr. Gerhardt. Right.

Ms. Garcia. I mean, do you think that she's at a level of position that is so sensitive that she couldn't just say what she did at the White House?

Mr. Gerhardt. And nobody is in that position, not even the President. Executive privilege may well apply to certain conversations that happened, but they're fairly narrowly defined. It certainly does not apply to everything the President does or the executive branch does. If it did, then that -- then in the executive branch, the President would be immune from any kind of check and balance

that can be imposed by either of the other branches.

Ms. Garcia. And it certainly -- you know, we've also seen many other Trump administration officials either be ordered not to come or they come and they don't really respond to many of our questions. You know, what does that do to this check and balance that you're referring to? I mean --

Mr. Gerhardt. It impedes the authority.

Ms. Garcia. Can you explain so that the average American understands just why really it's important for us to have Mr. Mueller come here next week, for Hope Hicks to come, for Jared Kushner, and all of the subpoenas? I mean, this isn't about harassment; this is about getting to the truth. Because if we don't do that, what might happen?

Mr. Gerhardt. Yes. I think it is immensely important. As a constitutional law professor, my client's the Constitution. I care about the Constitution. I care about it being appropriately read and appropriately applied and understood. And among the things that we would -- should understand about the Constitution is the fact that impeachment is something that happens at the end of a process. It's not required at the beginning of a process.

You need to be able to have a process, of which this committee clearly, legitimately has the authority to conduct, to determine what happened, the gravity of what happened, and whether or not Articles of Impeachment are appropriate or some other mechanism is appropriate for addressing them.



Ms. Garcia. And as you said, impeachment inquiry is not in the Constitution, the words?

Mr. Gerhardt. No. But impeachment, of course, is. But Article I, Section 5, vests this committee with the -- vests this Congress the authority to -- to adopt rules for its internal governance. That's -- it's the rules that govern the process that each committee conducts.

Ms. Garcia. All right. One final question. If you were here next week with us, what question would you ask Mr. Mueller?

Ms. Scanlon. I'm sorry, it's time.

Mr. Gerhardt. Thank you.

Ms. Scanlon. You may finish -- did you have a quick answer?

Ms. Garcia. Do you have a quick answer? She's --

Mr. Gerhardt. Oh, well, I can think of a lot of questions. I do think it's important to clarify and make sure you probably understand the moments in his report when he defers to Congress and is passing the ball to Congress.

Ms. Garcia. All right. Thank you.

Thank you, Madam Chair. I yield back.

Ms. Scanlon. Okay. I recognize the gentlewoman from Florida for 5 minutes.

Ms. Mucarsel-Powell. Thank you, Madam Chair.

I wanted to ask -- start by asking Mr. Gerhardt a question. According to the Mueller report, and among other things, President Trump requested then-Attorney General Jeff Sessions to reverse his

recusal from the special counsel investigation with an eye toward curtailing its scope. Once President Trump learned that he was under investigation for potential obstruction of justice, President Trump then ordered White House Counsel Don McGahn to have Special Counsel Mueller removed altogether.

So President Trump finds out of Jeff Sessions' recusal, he's extremely upset about this, then he asks Don McGahn to remove the special counsel. Would this be considered, in your opinion, impeachable conduct?

Mr. Gerhardt. Well, it certainly raises serious concerns. And I would -- I would suggest that those actions do raise legitimate suspicions about, not just the motivation, but about the effort to obstruct the investigations into obstructing inquiries that Mr. Mueller was authorized to conduct.

Ms. Mucarsel-Powell. And can you elaborate on your opinion on whether obstruction has also occurred after this President took office as we in this committee have requested for several fact witnesses to appear before us but they have been ordered by the President to not appear before us? How would you constitute that?

Mr. Gerhardt. Well, that's an exercise of power that he's attempting. The question is whether or not that's an abuse of power. To be able to direct people, not just who are currently in government, but who used to be in government, from speaking at all to the committee strikes me as a matter of great concern. That could be an abuse of power, because it stymies the committee's ability to gather evidence

and to make determinations based on that evidence.

Ms. Mucarsel-Powell. And do you have a view on the Miers holding that there's no absolute immunity for a Presidential aide? What is your view on that?

Mr. Gerhardt. Now, immunity from what? I just want to clarify.

Ms. Mucarsel-Powell. From testifying.

Mr. Gerhardt. Oh, from testifying. I think that -- this is one of those areas where it has to be kind of carefully circumscribed. So a President obviously has some ability to protect certain things, such as legitimate material protected by executive privilege. But he -- it doesn't extend to preventing people from doing their constitutional duty, I would say, to be able to comply with a subpoena and come before the committee and talk about things that might have crossed the line and might have been illegal or unconstitutional.

Ms. Mucarsel-Powell. Okay. Thank you.

A couple of more questions. If the executive branch has taken this position that a sitting President can't be indicted as a matter of constitutional law, then Congress probably can't change it through a statute.

Mr. Gerhardt. Right.

Ms. Mucarsel-Powell. But we can at least ensure that the statute of limitations for any offense doesn't run out before the President leaves office.

So this is for Ms. Fredrickson. If the President is immune from prosecution while in office, do you agree that it would make sense for

us to pass a law tolling the statute of limitations for any offenses, to ensure that there will ultimately be a mode of accountability?

Ms. Fredrickson. Well, it certainly seems like something Congress should examine. And I think Professor Eastman actually had said that he supports that legislation, so maybe it's a place where you can get strong bipartisan support.

But I would hate to think that our Constitution insulates the President from -- from any kind of accountability while he's President. And so I think it's very important for Congress to consider how to ensure that the President is not above the law.

Ms. Mucarsel-Powell. Thank you.

And, Mr. Gerhardt, are there any other types of legislation that Congress could enact that would help ensure some measure of accountability in situations where the Justice Department is refusing to bring charges against a sitting President?

Mr. Gerhardt. I said quite possibly. For example, I understand there may be legislation under consideration about protecting special prosecutors, special counsels from being easily terminated. That would be one obvious thing to try to do to try and protect the person whose job it is to consider whether or not there's any misconduct undertaken by the President or anybody at his direction that -- that is criminal or possibly impeachable.

Ms. Mucarsel-Powell. Thank you.

I yield back my time.

Ms. Scanlon. Okay. I just want to remind our committee members

that House rules and precedents require us to refrain from making inappropriate personal references to protected parties, including the President, and this includes accusations of dishonesty, criminality, treason, or other unethical or improper motive.

And with that, I would recognize Mr. Jordan for 5 minutes.

Mr. Jordan. Thank you, Madam Chair.

Ms. Fredrickson, what's the name of the organization that you -- you head up?

Ms. Fredrickson. The American Constitution Society.

Mr. Jordan. American Constitution Society.

Before the Mueller report was made public, and actually 2 days before Attorney General Barr did his first letter to tell us anything about the report, which was March 24 of this year, 2 days prior to that, on March 22, 2019, you said this. You said, the question isn't whether members of the Trump campaign conspired with Russia to sway the 2016 elections. We already know they did.

How did you know that before the report even came out?

Ms. Fredrickson. We had seen multiple indictments as well as prosecutions and convictions of people associated with Russia.

Mr. Jordan. But shouldn't normally someone who's heading up the Constitution Society, don't you normally wait until an investigation is over? Isn't -- in this great Nation, people are presumed to be innocent until -- till proven otherwise, and you are already making a finding, stating a finding as the head of the American Constitution Society before we even had the report by the special counsel's office.

Ms. Fredrickson. There was quite a lot of evidence already in the record. And I think the Mueller report then goes further to lay out multiple instances of contacts between Trump administration --

Mr. Jordan. What's interesting -- you just mentioned the Mueller report. What's interesting is that same day that you said the question isn't whether members of the Trump campaign conspired with Russia to sway the elections, we already know they did -- even though we didn't know that because the report wasn't done -- that same day you wrote an op-ed -- you just mentioned the Mueller report, but you wrote an op-ed that same day, March 22, 2019, where you said we don't need to read the Mueller report. And now you're telling us we do.

So before the report came out, before Bill Barr said anything, you said we already know he's guilty and, oh, by the way, don't read the report.

Ms. Fredrickson. Sir, I --

Mr. Jordan. Now you're telling us we should read the report?

Ms. Fredrickson. The point was a rhetorical one, that there is already so much evidence out there that Congress needs to examine.

Mr. Jordan. That's not what -- I've got the headline right there. We don't need to read the Mueller report. You wrote that, right?

Ms. Fredrickson. I didn't write the title actually. If you read the body of the opinion piece, you will see that it says Congress needs to get this report. So --

Mr. Jordan. Here's what you wrote -- just -- second paragraph.

Mr. Mueller's report may never go public, but we don't need to peek at the recommendations anyway.

So did you write that?

Ms. Fredrickson. I did.

Mr. Jordan. Okay. So you did. But now you're telling us we should read the report?

Ms. Fredrickson. I do, yes. There is much more in there.

Mr. Jordan. Let's read the report --

Ms. Fredrickson. We knew a fair amount already, but now we know more. And I think Congress needs to actually see the full report and the evidence underlying it. And --

Mr. Jordan. Let's read the report. Let's read the report.

Ms. Fredrickson. -- understand how Russia interfered in our elections. Which, again, I will state, I think it's troubling that your side of the aisle doesn't seem to want to examine --

Mr. Jordan. I think it's troubling that the head of the American Constitution Society said we already know that he did something before the report was final. Now you're telling us to read the report.

I'm going to read it on page 2. Page 2, the investigation did not establish that members of the Trump campaign conspired or coordinated with the Russian Government in its election interference activity.

So now that you -- first, you said don't read the report. Now you're saying read the report. I'm reading the report, and it directly contradicts what you said as the head of the American Constitution

Society.

And, of course, the Democrats think it's fine and appropriate to have the head of the American Constitution Society come in here and lecture us today and tell us today how we need to move towards impeachment. I mean, I just -- I fail to get it. I fail to get it.

So what do you say about that sentence right there on page 2, that now that you've changed your mind and say we should read the report, where Bob Mueller says -- the special counsel's office says the investigation did not establish that members of the Trump campaign conspired or coordinated with the Russian Government in its election interference activities?

Ms. Fredrickson. Well, I think it's unfortunate that you actually haven't read the opinion piece, which does say that Congress needs to see the full Mueller report. That is what the opinion piece says.

Mr. Jordan. We're talking about what you wrote, what you said, and what Bob Mueller said. You said that --

Ms. Fredrickson. Exactly what the opinion piece says, that Congress needs to get the full Mueller report.

Mr. Jordan. I think -- Mr. Chairman, here's what's interesting. Here's what's interesting. We have a witness today, who before the Mueller report was out, said we already know the President's guilty. Before Bill Barr issued his first statement on the report, says we already know he's guilty. That same day that she said those things, she writes an op-ed piece saying don't read the Mueller report, because



if you do, you'll find out what she claimed is absolutely not true.

Ms. Fredrickson. I would actually --

Mr. Jordan. And she's an expert witness today.

Ms. Fredrickson. -- once again, would recommend that you actually read the piece so that you can see what it says.

Mr. Jordan. I read your piece. I read the whole --

Ms. Fredrickson. Apparently not, because it does say that Congress --

Mr. Jordan. I did just a few minutes ago. Because I remember the exchange we had a few months ago right after -- right after Bill Barr had sent his March 24 letter we had a little discussion about this same type -- I can't believe the Democrats invited you back.

I yield back.

Ms. Fredrickson. As I said, it's really unfortunate you don't actually bother to read beyond the title.

Mr. Jordan. Mr. Chairman, I've got 20 seconds -- I've got 4 seconds. I did read -- and you know what? I did not follow her advice. I read the Mueller report. She's telling people not to.

Ms. Scanlon. Okay. And I know that the Mueller report then goes on to say that his conclusions would change if he were given access to additional evidence.

I now recognize Mr. Swalwell for 5 minutes.

Mr. Swalwell. Thank you, Madam Chair.

Professor Fredrickson, is there a difference between criminal conspiracy, something that could be proved beyond a reasonable doubt,

and conspiracy?

Ms. Fredrickson. Well, there's certainly a distinction in how the public talks about it and our understanding. And one of the things I had, you know, was hoping to engage in with your colleague here from the other side of the aisle, is an understanding that all of our intelligence agencies have indicated that the Russians had made sweeping attacks on our election systems. There were multiple contacts with Trump campaign officials that there were indictments, there were prosecutions. There's an enormous need for Congress to actually probe more deeply into how this happened and how to prevent it from happening again.

Mr. Swalwell. And when you read the 200 pages of Volume I that lay out the multiplicity of contacts between the Trump campaign and the Russians, do you see a failure of imagination by prior Congresses to write laws that would protect us from this type of conduct and to have a criminal remedy? Do you see gaps that occurred, like being approached and not telling the FBI that foreign adversaries are trying to --

Ms. Fredrickson. I know that Members of Congress are proposing such legislation. I think it's important to, again, I think as part of your authorities, to examine what happened, to see if in fact the laws were too weak and that allowed hostile foreign powers to have undue influence on campaign officials and to understand how influence might have been reached.

And so, yes, I think it's a very important part of your duties

to protect the integrity of our elections.

Mr. Swalwell. Thank you, Professor.

And, Professor Gerhardt, recognizing that the Mueller report says criminally the laws that we have now, no proof beyond a reasonable doubt that there was conspiracy in Volume I. However, functionally, as a Congress and constitutionally, because of the conduct that's laid out, is there recourse through impeachment -- just in what you have seen in how the Founders have described impeachment and how prior Congresses have engaged on impeachment, do you see a recourse for impeachment based on the 200 pages of just Volume I conduct?

Mr. Gerhardt. I think it's reasonable -- quite reasonable to consider the propriety of it. I think that it is reasonable to inquire, to investigate, to determine evidence and, again, to be able to hear witnesses and put together a record that is helpful to Congress to understand the gravity of whatever's happened, and as well as just whatever did happen.

One other thing I would just sort of emphasize in this context is something we've repeated a few times today, but it's really important to remember, and that is impeachable offenses don't have to be actual crimes. And so this committee, this House, or another committee or another House another time, may decide that there is something that's really serious, and they may want to call it conspiracy or they might want to call it something else, and they're entitled to do that. And they can take -- they have the authority to conduct proceedings to figure out what's happened.

Mr. Swalwell. And in your reading of the report, would you agree, Professor Gerhardt, that the Mueller team did not look at financial compromise of the President or anyone on his team?

Mr. Gerhardt. That's correct. And, again --

Mr. Swalwell. And I'll just let you -- let me add on to that. And would you agree that an impeachment inquiry would not prohibit the inquiring body from looking at financial compromise?

Mr. Gerhardt. That's correct.

Mr. Swalwell. Great. Thank you.

And I would yield back. Thank you.

Ms. Scanlon. Okay. Thank you.

Okay. This will conclude today's hearing. I want to thank all the witnesses for attending. We really appreciate your insights.

And without objection, all members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

Without objection, the hearing's adjourned.

[Whereupon, at 11:47 a.m., the committee was adjourned.]

# **EXHIBIT U**

# U.S. House of Representatives

## Committee on the Judiciary

Washington, DC 20515-6216

One Hundred Sixteenth Congress

### MEMORANDUM

**To:** Members of the Committee on the Judiciary  
**From:** Chairman Jerrold Nadler  
**Date:** June 19, 2019  
**Re:** Hearing on “Lessons from the Mueller Report, Part II: Bipartisan Perspectives”

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The Committee on the Judiciary will hold a hearing entitled “Lessons from the Mueller Report, Part II: Bipartisan Perspectives” on Thursday, June 20, 2019, at 10:00 a.m. in 2141 Rayburn House Office Building. The following are the Majority witnesses: Carrie Cordero, Senior Fellow and General Counsel, Center on a New American Security, and Adjunct Professor of Law, Georgetown University Law Center; Richard L. Hasen, Chancellor’s Professor of Law and Political Science, University of California Irvine School of Law; and Alina Polyakova, Director, Project on Global Democracy and Emerging Technology, Brookings Institution. The Minority witness is Professor Saikrishna Prakash, James Monroe Distinguished Professor of Law and Paul G. Mahoney Research Professor of Law at the University of Virginia School of Law.

#### **I. Oversight of the Mueller Report, Part II – Background**

Volume I of Special Counsel Robert Mueller’s *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* (“Mueller Report” or “the Report”) concludes that Russia “interfered in the 2016 presidential election in sweeping and systematic fashion.”<sup>1</sup> The Report explains that this interference occurred “principally through two operations.”<sup>2</sup> First, a Russian entity known as the Internet Research Agency (“IRA”) “carried out a social media campaign that favored presidential candidate Donald J. Trump and disparaged presidential candidate Hillary Clinton.” The IRA’s goals evolved from general attempts to sow “political and social discord in the United States” into a “targeted operation that by early 2016 favored candidate Trump.”<sup>3</sup> Second, Russia’s Main Intelligence Directorate of the General Staff of the Russian Army—known as the GRU—“conducted computer-intrusion operations against entities, employees, and volunteers working on the Clinton Campaign and then released stolen documents.”<sup>4</sup> Through these operations, the GRU stole hundreds of thousands of documents, which it then disseminated in a targeted fashion to WikiLeaks and fictitious online personas.<sup>5</sup>

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<sup>1</sup> Robert S. Mueller, III, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election* (Mar. 2019), Vol. I at 1 (hereinafter “Mueller Report”).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Vol. I at 4.

<sup>4</sup> *Id.* Vol. I at 1.

<sup>5</sup> *Id.* Vol. I at 4

Special Counsel Mueller's investigation "also identified numerous links between the Russian government and the Trump Campaign."<sup>6</sup> These contacts "consisted of business connections, offers of assistance to the Campaign, invitations for candidate Trump and Putin to meet in person, invitations for Campaign officials and representatives of the Russian government to meet, and policy positions seeking improved U.S.-Russian relations."<sup>7</sup> The investigation was not able to establish that the Trump Campaign conspired or coordinated with the Russian government in its interference activities. However, it "established that the Russian government perceived it would benefit from a Trump presidency and worked to secure that outcome, and that the [Trump] Campaign expected it would benefit electorally from information stolen and released through Russian efforts."<sup>8</sup>

In particular, the Trump Campaign "showed interest in WikiLeaks's releases of documents and welcomed their potential damage to candidate Clinton."<sup>9</sup> As WikiLeaks began releasing these stolen emails, the Trump Campaign by the late summer of 2016 was "planning a press strategy, a communications campaign, and messaging based on the possible release of Clinton emails by WikiLeaks."<sup>10</sup> Although relevant portions of the Mueller Report remain redacted, the unredacted text shows at least one instance in which then-candidate Trump appeared to have advanced knowledge that "more releases of damaging information would be coming."<sup>11</sup> Then-candidate Trump also announced in July 2016 that he hoped Russia would "find the 30,000 emails that are missing" from a private server used by Clinton when she was Secretary of State.<sup>12</sup> "Within approximately five hours of Trump's statement, GRU officers targeted for the first time Clinton's personal office."<sup>13</sup>

Several high-ranking officials from the Trump Campaign also expressed an openness to "receive derogatory information about Hillary Clinton from the Russian government."<sup>14</sup> On June 3, 2016, Robert Goldstone, a publicist whose client's family is connected to Vladimir Putin and the Russian government, emailed Donald Trump Jr. indicating that a Russian prosecutor was offering to provide the Trump Campaign "with some official documents and information that would incriminate Hillary and her dealings with Russia."<sup>15</sup> He explained that this was "'part of Russia and its government's support for Mr. Trump.'" Trump Jr. immediately responded that "if it's what you say I love it," and arranged to meet with the Russian prosecutor and other senior campaign officials.<sup>16</sup>

When asked in a June 12, 2019 interview whether an electoral candidate should call the FBI if he or she is approached by a foreign government with information about an opponent, President Trump answered, "You don't call the FBI. . . . Give me a break. Life doesn't work that way."<sup>17</sup> The President

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<sup>6</sup> *Id.* Vol. I at 1.

<sup>7</sup> *Id.* Vol. I at 5.

<sup>8</sup> *Id.* Vol. I at 1-2.

<sup>9</sup> *Id.* Vol. I at 5.

<sup>10</sup> *Id.* Vol. I at 54.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Vol. I at 62.

<sup>13</sup> *Id.* Vol. I at 49.

<sup>14</sup> *Id.* Vol. I at 110.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> President Donald J. Trump, interview with George Stephanopoulos, ABC News, June 12, 2019, available at [https://www.realclearpolitics.com/video/2019/06/12/trump\\_i\\_would\\_accept\\_information\\_on\\_my\\_opponent\\_from\\_foreign\\_governments\\_its\\_called\\_oppo\\_research.html](https://www.realclearpolitics.com/video/2019/06/12/trump_i_would_accept_information_on_my_opponent_from_foreign_governments_its_called_oppo_research.html).

was then asked directly whether his campaign would accept information about an opponent from a foreign government in the next election. He responded, “I think you might want to listen. . . . I think I’d want to hear it.” In a subsequent interview, President Trump stated that he would look at the information but would also “of course” contact the FBI or the Attorney General.<sup>18</sup>

As the Committee has previously expressed, it is conducting an ongoing investigation whose purposes include: “1) investigating and exposing any possible malfeasance, abuse of power, corruption, obstruction of justice, or other misconduct on the part of the President or other Members of his Administration; 2) considering whether the conduct uncovered may warrant amending or creating new federal authorities, including among other things, relating to election security, campaign finance, misuse of electronic data, and the types of obstructive conduct that the Mueller Report describes; and 3) considering whether any of the conduct described in the Special Counsel’s Report warrants the Committee in taking any further steps under Congress’ Article 1 powers.”<sup>19</sup> The investigation includes consideration of whether to recommend “articles of impeachment with respect to the President or any other Administration official, as well as the consideration of other steps such as censure or issuing criminal, civil or administrative referrals. No determination has been made as to such further actions, and the Committee needs to review the unredacted [Mueller] report, the underlying evidence, and associated documents so that it can ascertain the facts and consider its next steps.”<sup>20</sup>

This hearing will focus in particular on the lessons that can be gained from the Mueller Report and all potential remedies to prevent any misconduct from recurring. Witnesses will discuss the Mueller Report’s description of Russia’s efforts to interfere in the 2016 presidential election and the evidence that President Trump’s campaign was receptive to Russia’s assistance. The hearing will also focus on President Trump’s recent remarks suggesting that he would knowingly accept opposition research from a foreign government in the next election. Witnesses may also discuss potential legislative remedies aimed to deter and counter foreign influence operations.

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<sup>18</sup> *Trump Says ‘Of Course’ He Would Tell the FBI If He Gets Foreign Dirt*, Associated Press, June 14, 2019.

<sup>19</sup> See H. Rep. No. 116-105 (2019).

<sup>20</sup> *Id.*



# **EXHIBIT V**

RPTR ZAMORA

EDTR ZAMORA

OVERSIGHT OF THE REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE  
IN THE 2016 PRESIDENTIAL ELECTION: FORMER SPECIAL COUNSEL ROBERT S.  
MUELLER, III

Wednesday, July 24, 2019

House of Representatives,  
Committee on the Judiciary,  
Washington, D.C.

The committee met, pursuant to call, at 8:32 a.m., in Room 2141,  
Rayburn House Office Building, Hon. Jerrold Nadler [chairman of the  
committee] presiding.

Present: Representatives Nadler, Lofgren, Jackson Lee, Cohen,  
Johnson of Georgia, Deutch, Bass, Richmond, Jeffries, Cicilline,  
Swalwell, Lieu, Raskin, Jayapal, Demings, Correa, Scanlon, Garcia,  
Neguse, McBath, Stanton, Dean, Mucarsel-Powell, Escobar, Collins,  
Sensenbrenner, Chabot, Gohmert, Jordan, Buck, Ratcliffe, Roby, Gaetz,  
Johnson of Louisiana, Biggs, McClintock, Lesko, Reschenthaler, Cline,  
Armstrong, and Steube.

Staff Present: Aaron Hiller, Deputy Chief Counsel; Arya Hariharan, Deputy Chief Oversight Counsel; David Greengrass, Senior Counsel; John Doty, Senior Advisor; Lisette Morton, Director Policy, Planning, and Member Services; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Susan Jensen, Parliamentarian/Senior Counsel; Sarah Istel, Oversight Counsel; Julian Gerson, Staff Assistant; Will Emmons, Professional Staff Member; Brendan Belair, Minority Staff Director; Bobby Parmiter, Minority Deputy Staff Director/Chief Counsel; Jon Ferro, Minority Parliamentarian/General Counsel; Carlton David, Minority Chief Oversight Counsel; Ashley Callen, Minority Oversight Counsel; Danny Johnson, Minority Oversight Counsel; Jake Greenberg, Minority Oversight Counsel; and Erica Barker, Minority Chief Legislative Clerk.

Chairman Nadler. The Judiciary Committee will come to order. Without objection, the chair is authorized to declare recesses of the committee at any time.

We welcome everyone to today's hearing on oversight of the report on the investigation into Russian interference in the 2016 Presidential election. I will now recognize myself for a brief opening statement.

Director Mueller, thank you for being here. I want to say just a few words about our themes today: responsibility, integrity, and accountability. Your career, for example, is a model of responsibility. You are a decorated Marine officer. You were awarded a Purple Heart and the Bronze Star for valor in Vietnam. You served in senior roles at the Department of Justice, and in the immediate aftermath of 9/11, you served as director of the FBI.

Two years ago, you return to public service to lead the investigation into Russian interference in the 2016 elections. You conducted that investigation with remarkable integrity. For 22 months, you never commented in public about your work, even when you were subjected to repeated and grossly unfair personal attacks. Instead, your indictments spoke for you and in astonishing detail.

Over the course of your investigation, you obtained criminal indictments against 37 people and entities. You secured the conviction of President Trump's campaign chairman, his deputy campaign manager, his National Security Advisor, and his personal lawyer, among others. In the Paul Manafort case alone, you recovered as much as

\$42 million so that the cost of your investigation to the taxpayers approaches zero.

And in your report you offer the country accountability as well. In Volume I, you find that the Russian Government attacked our 2016 elections, quote, in a sweeping and systematic fashion, and that the attacks were designed to benefit the Trump campaign.

Volume II walks us through 10 separate incidents of possible obstruction of justice where, in your words, President Trump attempted to exert undue influence over your investigation. The President's behavior included, and I quote from your report, quote, public attacks on the investigation, nonpublic efforts to control it, and efforts in both public and private to encourage witnesses not to cooperate, close quote.

Among the most shocking of these incidents, President Trump ordered his White House counsel to have you fired and then to lie and deny that it had happened. He awarded his former campaign manager to convince the recused Attorney General to step in and to limit your work, and he attempted to prevent witnesses from cooperating with your investigation.

Although Department policy barred you from indicting the President for this conduct, you made clear that he is not exonerated. Any other person who acted in this way would have been charged with crimes, and in this Nation, not even the President is above the law, which brings me to this committee's work: responsibility, integrity, and accountability. These are the marks by which we who serve on this

committee will be measured as well.

Director Mueller, we have a responsibility to address the evidence that you have uncovered. You recognize as much when you said, quote, the Constitution requires a process other than the criminal justice system to formally accuse a sitting President of wrongdoing, close quote. That process begins with the work of this committee.

We will follow your example, Director Mueller. We will act with integrity. We will follow the facts where they lead. We will consider all appropriate remedies. We will make our recommendation to the House when our work concludes. We will do this work because there must be accountability for the conduct described in your report, especially as it relates to the President.

Thank you again, Director Mueller. We look forward to your testimony.

It is now my pleasure to recognize the ranking member of the Judiciary Committee, the gentleman from Georgia, Mr. Collins, for his opening statement.

[The statement of Chairman Nadler follows:]

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Mr. Collins. Thank you, Mr. Chairman. And thank you, Mr. Mueller, for being here.

For 2 years leading up to the release of the Mueller report and in the 3 months since, Americans were first told what to expect and then what to believe. Collusion, we were told, was in plain sight, even if the special counsel's team didn't find it.

When Mr. Mueller produced his report and Attorney General Barr provided it to every American, we read no American conspired with Russia to interfere in our elections but learned the depths of Russia's malice toward America.

We are here to ask serious questions about Mr. Mueller's work, and we will do that. After an extended, unhampered investigation, today marks an end to Mr. Mueller's involvement in an investigation that closed in April. The burden of proof for accusations that remain unproven is extremely high and especially in light of the special counsel's thoroughness.

We were told this investigation began as an inquiry into whether Russia meddled in our 2016 election. Mr. Mueller, you concluded they did. Russians accessed Democrat servers and disseminated sensitive information by tricking campaign insiders into revealing protected information.

The investigation also reviewed whether Donald Trump, the President, sought Russian assistance as a candidate to win the Presidency. Mr. Mueller concluded he did not. His family or advisers

did not. In fact, the report concludes no one in the President's campaign colluded, collaborated, or conspired with the Russians.

The President watched the public narrative surrounding this investigation [inaudible] assume his guilt while he knew the extent of his innocence. Volume II of Mr. Mueller's report details the President's reaction to frustrating investigation where his innocence was established early on. The President's attitude toward the investigation was understandably negative, yet the President did not use his authority to close the investigation. He asked his lawyer if Mr. Mueller had conflicts that disqualified Mr. Mueller from the job, but he did not shut down the investigation. The President knew he was innocent.

Those are the facts of the Mueller report. Russia meddled in the 2016 election, the President did not conspire with the Russians, and nothing we hear today will change those facts. But one element of this story remains: the beginnings of the FBI investigation into the President. I look forward to Mr. Mueller's testimony about what he found during his review of the origins of the investigation.

In addition, the inspector general continues to review how baseless gossip can be used to launch an FBI investigation against a private citizen and eventually a President. Those results will be released, and we will need to learn from them to ensure government intelligence and our law enforcement powers are never again used and turned on a private citizen or a potential -- or a political candidate as a result of the political leanings of a handful of FBI agents.



The origins and conclusions of the Mueller investigation are the same things: what it means to be American. Every American has a voice in our democracy. We must protect the sanctity of their voice by combatting election interference. Every American enjoys the presumption of innocence and guarantee of due process. If we carry nothing -- anything away today, it must be that we increase our vigilance against foreign election interference, while we ensure our government officials don't weaponize their power against the constitutional rights guaranteed to every U.S. citizen.

Finally, we must agree that the opportunity cost here is too high. The months we have spent investigating from this dais failed to end the border crisis or contribute to the growing job market. Instead, we have gotten stuck, and it's paralyzed this committee and this House.

And as a side note, every week, I leave my family and kids, the most important things to me, to come to this place because I believe this place is a place where we can actually do things and help people. Six and a half years ago, I came here to work on behalf of the people of the Ninth District in this country, and we accomplished a lot in those first 6 years on a bipartisan basis with many of my friends across the aisle sitting on this dais with me today. However, this year, because of the majority's dislike of this President and the endless hearing and to a closed investigation have caused us to accomplish nothing except talk about the problems of our country, while our border is on fire, in crisis, and everything else is stopped.

This hearing is long overdue. We have had truth for months. No

American conspired to throw our election. What we need today is to let that truth bring us confidence, and I hope, Mr. Chairman, closure.

With that, I yield back.

[The statement of Mr. Collins follows:]

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Chairman Nadler. Thank you, Mr. Collins.

I will now introduce today's witness.

Robert Mueller served as Director of the FBI from 2001 to 2013, and most recently served as special counsel in the Department of Justice overseeing the investigation into Russian interference in the 2016 special election.

He received his BA from Princeton University and MA from New York University, in my district, and his JD from the University of Virginia. Mr. Mueller is accompanied by his -- by counsel, Aaron Zebley, who served as deputy special counsel on the investigation.

We welcome our distinguished witness, and we thank you for participating in today's hearing.

Now, if you would please rise, I will begin by swearing you in.

Raise your right hand, please. Left hand.

Do you swear or affirm under penalty of perjury that the testimony you're about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

Let the record show the witness answered in the affirmative.

Thank you. And please be seated.

Please note that your written statement will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in 5 minutes.

Director Mueller, you may begin.

**STATEMENT OF ROBERT S. MUELLER, III, SPECIAL COUNSEL, THE SPECIAL COUNSEL'S OFFICE, THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, MAY 2017 TO MAY 2019**

Mr. Mueller. Good morning, Chairman Nadler and Ranking Member Collins, and the members of the committee.

As you know, in May 2017, the Acting Attorney General asked me to serve as special counsel. I undertook that role because I believed that it was of paramount interest to the Nation to determine whether a foreign adversary had interfered in the Presidential election. As the Acting Attorney General said at the time, the appointment was necessary in order for the American people to have full confidence in the outcome.

My staff and I carried out this assignment with that critical objective in mind: to work quietly, thoroughly, and with integrity so that the public would have full confidence in the outcome.

The order appointing me as special counsel directed our office to investigate Russian interference in the 2016 Presidential election. This included investigating any links or coordination between the Russian Government and individuals associated with the Trump campaign. It also included investigating efforts to interfere with or obstruct our investigation.

Throughout the investigation, I continually stressed two things to the team that we had assembled. First, we needed to do our work as thoroughly as possible and as expeditiously as possible. It was

in the public interest for our investigation to be complete but not to last a day longer than was necessary.

Second, the investigation needed to be conducted fairly and with absolute integrity. Our team would not leak or take other actions that could compromise the integrity of our work. All decisions were made based on the facts and the law.

During the course of our investigation, we charged more than 30 defendants with committing Federal crimes, including 12 officers of the Russian military. Seven defendants have been convicted or pled guilty. Certain other charges we brought remain pending today, and for those matters, I stress that the indictments contain allegations and every defendant is presumed innocent unless and until proven guilty.

In addition to the criminal charges we brought, as required by Justice Department regulations, we submitted a confidential report to the Attorney General at the conclusion of our investigation. The report set forth the results of our work and the reasons for our charging and declination decisions. The Attorney General later made the report largely public.

As you know, I made a few limited remarks about our report when we closed the Special Counsel's Office in May of this year, but there are certain points that bear emphasis. First, our investigation found that the Russian Government interfered in our election in sweeping and systematic fashion.

Second, the investigation did not establish that members of the

Trump campaign conspired with the Russian Government in its election interference activities. We did not address collusion, which is not a legal term; rather, we focused on whether the evidence was sufficient to charge any member of the campaign with taking part in a criminal conspiracy, and it was not.

Third, our investigation of efforts to obstruct the investigation and lie to investigators was of critical importance. Obstruction of justice strikes at the core of the government's effort to find the truth and to hold wrongdoers accountable.

Finally, as described in Volume II of our report, we investigated a series of actions by the President towards the investigation. Based on Justice Department policy and principles of fairness, we decided we would not make a determination as to whether the President committed a crime. That was our decision then and it remains our decision today.

Let me say a further word about my appearance today. It is unusual for a prosecutor to testify about a criminal investigation. And given my role as a prosecutor, there are reasons why my testimony will necessarily be limited.

First, public testimony could affect several ongoing matters. In some of these matters, court rules or judicial orders limit the disclosure of information to protect the fairness of the proceedings. And consistent with longstanding Justice Department policy, it would be inappropriate for me to comment in any way that could affect an ongoing matter.

Second, the Justice Department has asserted privileges

concerning investigative information and decisions, ongoing matters within the Justice Department, and deliberations within our office. These are Justice Department privileges that I will respect. The Department has released the letter discussing the restrictions on my testimony. I therefore will not be able to answer questions about certain areas that I know are of public interest.

For example, I am unable to address questions about the initial opening of the FBI's Russia investigation, which occurred months before my appointment, or matters related to the so-called Steele dossier. These matters are subjects of ongoing review by the Department. Any questions on these topics should therefore be directed to the FBI or the Justice Department.

As I explained when we closed the Special Counsel's Office in May, our report contains our findings and analysis and the reasons for the decisions we made. We conducted an extensive investigation over 2 years. In writing the report, we stated the results of our investigation with precision. We scrutinized every word. I do not intend to summarize or describe the results of our work in a different way in the course of my testimony today. And as I said on May 29, the report is my testimony, and I will stay within that text.

And as I stated in May, I will not comment on the actions of the Attorney General or of Congress. I was appointed as a prosecutor, and I intend to adhere to that role and to the Department standards that govern it.

I will be joined today by Deputy Special Counsel Aaron Zebley.

Mr. Zebley has extensive experience as a Federal prosecutor and at the FBI, where he served as my chief of staff. Mr. Zebley was responsible for the day-to-day oversight of the investigations conducted by our office.

Now, I also want to, again, say thank you to the attorneys, the FBI agents, the analysts, the professional staff who helped us conduct this investigation in a fair and independent manner. These individuals, who spent nearly 2 years working on this matter, were of the highest integrity.

Let me say one more thing. Over the course of my career, I have seen a number of challenges to our democracy. The Russian Government's effort to interfere in our election is among the most serious. And as I said on May 29, this deserves the attention of every American.

Thank you, Mr. Chairman.

[The statement of Mr. Mueller follows:]

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# **EXHIBIT W**

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FORMER SPECIAL COUNSEL ROBERT S. MUELLER III ON THE INVESTIGATION INTO  
RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION

Wednesday, July 24, 2019

U.S. House of Representatives,  
Permanent Select Committee on Intelligence,  
Washington, D.C.

The committee met, pursuant to call, at 12:50 p.m., in Room HVC-304, Capitol  
Visitor Center, the Honorable Adam Schiff (chairman of the committee) presiding.

Present: Representatives Schiff, Himes, Sewell, Carson, Speier, Quigley,  
Swalwell, Castro, Heck, Welch, Maloney, Demings, Krishnamoorthi, Nunes, Conaway,  
Turner, Wenstrup, Stewart, Crawford, Stefanik, Hurd, and Ratcliffe.

The Chairman. The committee will come to order. At the outset and on behalf of my colleagues, I want to thank you, Special Counsel Mueller, for a lifetime of service to the country. Your report, for those who have taken the time to study it, is methodical, and it is devastating, for it tells the story of a foreign adversary's sweeping and systematic intervention in a close U.S. Presidential election. That should be enough to deserve the attention of every American, as you well point out. But your report tells another story as well.

For the story of the 2016 election is also a story about disloyalty to country, about greed, and about lies. Your investigation determined that the Trump campaign, including Donald Trump himself, knew that a foreign power was intervening in our election and welcomed it, built Russian meddling into their strategy and used it.

Disloyalty to country. Those are strong words, but how else are we to describe a Presidential campaign which did not inform the authorities of an foreign offer of dirt on their opponent, which did not publicly shun it or turn it away, but which instead invited it, encouraged it, and made full use of it. That disloyalty may not have been criminal. Constrained by uncooperative witnesses, the destruction of documents and the use of encrypted communications, your team was not able to establish each of the elements of the crime of conspiracy beyond a reasonable doubt, so not provable crime in any event. But I think maybe something worse.

A crime is the violation of law written by Congress, but disloyalty to country violates the very oath of citizenship, our devotion to a core principle on which our Nation was founded, that we, the people, and not some foreign power that wishes us ill, we decide who governs us.

This is also a story about money, about greed and corruption, about the

leadership of a campaign willing to compromise the Nation's interest, not only to win but to make money at the same time. About a campaign chairman indebted to pro-Russian interests who tried to use his position to clear his debts and make millions. About a national security advisory using his position to make money from still other foreign interests. And about a candidate trying to make more money than all of them put together through a real estate project that to him was worth a fortune, hundreds of millions of dollars and the realization of a life-long ambition: a Trump Tower in the heart of Moscow. A candidate who in fact viewed his whole campaign as the greatest infomercial in history.

Donald Trump and his senior staff were not alone in their desire to use the election to make money. For Russia, too, there was a powerful financial motive. Putin wanted relief from economic sanctions imposed in the wake of Russia's invasion of Ukraine and over human rights violations.

The secret Trump Tower meeting between the Russians and senior campaign officials was about sanctions. The secret conversations between Flynn and the Russian Ambassador were about sanctions. Trump and his team wanted more money for themselves, and the Russians wanted more money for themselves and for their oligarchs.

The story doesn't end here either, for your report also tells a story about lies, lots of lies. Lies about a gleaming tower in Moscow and lies about talks with the Kremlin. Lies about the firing of FBI Director James Comey and lies about efforts to fire you, Director Mueller, and lies to cover it up. Lies about secret negotiations with the Russians over sanctions and lies about WikiLeaks. Lies about polling data and lies about hush money payments. Lies about meetings in the Seychelles to set up secret back channels and lies about a secret meeting in New York Trump Tower. Lies to the FBI. Lies to your staff. And lies to this committee. Lies to obstruct an investigation into the

most serious attack on our democracy by a foreign power in our history.

That is where your report ends, Director Mueller, with a scheme to cover up, obstruct, and deceive every bit as systematic and pervasive as the Russian disinformation campaign itself, but far more pernicious since this rot came from within. Even now, after 448 pages and 2 volumes, the deception continues. The President and his acolytes say your report found no collusion, though your report explicitly declined to address that question, since collusion can involve both criminal and noncriminal conduct.

Your report laid out multiple offers of Russian help to the Trump campaign, the campaign's acceptance of that help, and overt acts in furtherance of Russian help. To most Americans, that is the very definition of collusion, whether it is a crime or not. They say your report found no evidence of obstruction, though you outline numerous actions by the President intended to obstruct the investigation.

They say the President has been fully exonerated, though you specifically declare you could not exonerate him. In fact, they say your whole investigation was nothing more than a witch hunt, that the Russians didn't interfere in our election, that it is all a terrible hoax. The real crime, they say, is not that the Russians intervened to help Donald Trump but that the FBI had the temerity to investigate it when they did.

But, worst of all, worse than all the lies and the greed is the disloyalty to country. For that, too, continues. When asked if the Russians intervene again, will you take their help, Mr. President? Why not, was the essence of his answer; everyone does it.

No, Mr. President, they don't. Not in the America envisioned by Jefferson, Madison, and Hamilton. Not for those who believe in the idea that Lincoln labored until his dying day to preserve the idea animating our great national experiments so unique then, so precious still, that our government is chosen by our people through our franchise, and not by some hostile foreign power.

This is what is at stake, our next election and the one after that for generations to come. Our democracy. This is why your work matters, Director Mueller, this is why our investigation matters, to bring these dangers to light.

Ranking Member Nunes.

[The statement of The Chairman follows:]

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Mr. Nunes. Thank you, Mr. Chairman.

Welcome, everyone, to the last gasp of the Russia collusion conspiracy theory. As Democrats continue to foist this spectacle on the American people, as well as you, Mr. Mueller, the American people may recall the media first began spreading this conspiracy theory in the spring of 2016 when Fusion GPS, funded by the DNC and the Hillary Clinton campaign, started developing the Steele dossier, an collection outlandish accusations that Trump and his associates were Russian agents.

Fusion GPS, Steele, and other confederates fed these absurdities to naive or partisan reporters, and to top officials in numerous agencies, including the FBI, the Department of Justice, and the State Department. Among other things, the FBI used dossier allegations to obtain a warrant to spy on the Trump campaign, despite acknowledging dossier allegations as being salacious and unverified. Former FBI Director James Comey briefed those allegations to President Obama and President-elect Trump, those briefings conveniently leaked to the press, resulting in the publication of the dossier and launching thousands of false press stories based on the word of a foreign ex-spy. One who admitted he was desperate that Trump lose the election, and who was eventually fired as an FBI source for leaking to the press.

After Comey himself was fired, by his own admission, he leaked derogatory information on President Trump to the press for the specific purpose, and successfully so, of engineering the appointment of a special counsel who sits here before us today.

The FBI investigation was marred by further corruption and bizarre abuses. Top DOJ official Bruce Ohr, whose own wife worked on Fusion GPS' anti-Trump operation, fed Steele's information to the FBI, even after the FBI fired Steele.

The top FBI investigator and his lover, another top FBI official, constantly texted

about how much they hated Trump and wanted to stop him from being elected. And the entire investigation was opened based not on Five Eyes intelligence but on a tip from a foreign politician about a conversation involving Joseph Mifsud. He is a Maltese diplomat who's widely portrayed as a Russian agent but seems to have far more connections with Western governments, including our own FBI and our own State Department, than with Russia.

Brazenly ignoring all these red flags as well as the transparent absurdity of the claims they are making, the Democrats have argued for nearly 3 years that evidence of collusion is hidden just around the corner. Like the Loch Ness monster, they insist it's there, even if no one can find it.

Consider this, in March 2017, Democrats on this committee said they had more than circumstantial evidence of collusion, but they couldn't reveal it yet. Mr. Mueller was soon appointed, and they said he would find the collusion. Then when no collusion was found in Mr. Mueller's indictments, the Democrats said we'd find it in his final report. Then when there was no collusion in the report, we were told Attorney General Barr was hiding it. Then when it was clear Barr wasn't hiding anything, we were told it will be revealed through a hearing with Mr. Mueller himself.

And now that Mr. Mueller is here, they're claiming that the collusion has actually been in his report all along, hidden in plain sight. And they're right. There is collusion in plain sight: collusion between Russia and the Democratic Party. The Democrats colluded with Russian sources to develop the Steele dossier. And Russian lawyer Natalia Veselnitskaya colluded with the dossier's key architect, Fusion GPS head Glenn Simpson.

The Democrats have already admitted, both in interviews and through their usual anonymous statements to reporters, that today's hearing is not about getting information at all. They said they want to, quote, bring the Mueller report to life and create a



television moment through ploys like having Mr. Mueller recite passages from his own report.

In other words, this hearing is political theater. It's a Hail Mary attempt to convince the American people that collusion is real and that it's concealed in the report. Granted, that's a strange argument to make about a report that is public. It's almost like the Democrats prepared arguments accusing Mr. Barr of hiding the report and didn't bother to update their claims once he published the entire thing.

Among congressional Democrats, the Russia investigation was never about finding the truth. It's always been a simple media operation. By their own accounts, this operation continues in this room today. Once again, numerous pressing issues this committee needs to address are put on hold to indulge the political fantasies of people who believed it was their destiny to serve Hillary Clinton's administration.

It's time for the curtain to close on the Russia hoax. The conspiracy theory is dead. At some point, I would argue, we're going to have to get back to work. Until then, I yield back the balance of my time.

[The statement of Mr. Nunes follows:]

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The Chairman. To ensure fairness and make sure that our hearing is prompt -- I know we got a late start, Director Mueller -- the hearing will be structured as follows. Each member of the committee will be afforded 5 minutes to ask questions, beginning with the chair and ranking member. As chair, I will recognize thereafter, in an alternating fashion and descending order of seniority, members of the majority and minority.

After each member has asked his or her questions, the ranking member will be afforded an additional 5 minutes to ask questions, followed by the chair, who will have additional 5 minutes for questions. The ranking member and the chair will not be permitted to delegate or yield our final round of questions to any other member.

After six members of the majority and six members of the minority have concluded their 5-minute rounds of questions, we'll take a 5- or 10-minute break, that we understand you've requested, before resuming the hearing with Congressman Swalwell starting his round of questions.

Special Counsel Mueller is accompanied today by Aaron Zebley, who served as deputy special counsel from May 2017 until May 2019 and had day-to-day oversight of the special counsel's investigation. Mr. Mueller and Mr. Zebley resigned from the Department of Justice at the end of May 2019 when the Special Counsel's Office was closed.

Both Mr. Mueller and Mr. Zebley will be available to answer questions today and will be sworn in consistent with the rules of the House and the committee. Mr. Mueller and Mr. Zebley's appearance today before the committee is in keeping with the committee's long-standing practice of receiving testimony from current or former Department of Justice and FBI personnel regarding open and closed investigative matters.

As this hearing is under oath and before we begin your testimony, Mr. Mueller and Zebley, would you please rise and raise your right hands to be sworn.

Do you swear or affirm that the testimony you're about to give at this hearing is the whole truth and nothing but the truth?

Mr. Mueller. I do.

Mr. Zebley. I do.

The Chairman. The record will reflect that the witnesses have been duly sworn. Ranking member?

Mr. Nunes. Thank you, Mr. Chair. I just want to clarify that this is highly unusual for Mr. Zebley to be sworn in. We're here to ask Director Mueller questions. He's here as counsel. Our side is not going to be directing any questions to Mr. Zebley, and we have concerns about his prior representation of the Hillary Clinton campaign aide. So I just want to voice that concern that we do have, and we will not be addressing any questions to Mr. Zebley today.

The Chairman. I thank the ranking member. I realize, as you probably do, Mr. Zebley, that there is an angry man down the street who's not happy about you being here today, but it is up to this committee and not anyone else who will be allowed to be sworn in and testify, and you are welcome, as a private citizen, to testify, and members may direct their questions to whoever they choose.

With that, Director Mueller, you are recognized for any opening remarks you would like to make.

**TESTIMONY OF ROBERT S. MUELLER III, FORMER SPECIAL COUNSEL**

Mr. Mueller. Thank you. Good afternoon, Chairman Schiff, Ranking Member Nunes, and members of the committee. I testified this morning before the House Judiciary Committee. I ask that the opening statement I made before that committee be incorporated into the record here.

The Chairman. Without objection, Director.

[The information follows:]

\*\*\*\*\* COMMITTEE INSERT \*\*\*\*\*

Mr. Mueller. I understand that this committee has a unique jurisdiction and that you are interested in further understanding the counterintelligence implications of our investigation. So let me say a word about how we handled the potential impact of our investigation on counterintelligence matters.

As we explained in our report, the special counsel regulations effectively gave me the role of United States Attorney. As a result, we structured our investigation around evidence for possible use in prosecution of Federal crimes. We did not reach what you would call counterintelligence conclusions. We did, however, set up processes in the office to identify and pass counterintelligence information on to the FBI.

Members of our office periodically briefed the FBI about counterintelligence information. In addition, there were agents and analysts from the FBI who were not on our team but whose job it was to identify counterintelligence information in our files and to disseminate that information to the FBI. For these reasons, questions about what the FBI has done with the counterintelligence information obtained from our investigation should be directed to the FBI.

I also want to reiterate a few points that I made this morning. I am not making any judgments or offering opinions about the guilt or innocence in any pending case. It is unusual for a prosecutor to testify about a criminal investigation, and given my role as a prosecutor, there are reasons why my testimony will necessarily be limited.

First, public testimony could affect several ongoing matters. In some of these matters, court rules or judicial orders limit the disclosure of information to protect the fairness of the proceedings. And consistent with longstanding Justice Department policy, it would be inappropriate for me to comment in any way that could affect an ongoing matter.

Second, the Justice Department has asserted privileges concerning investigative information and decisions, ongoing matters within the Justice Department, and deliberations within our office. These are Justice Department privileges that I will respect. The Department has released a letter discussing the restrictions on my testimony. I, therefore, will not be able to answer questions about certain areas that I know are of public interest.

For example, I am unable to address questions about the opening of the FBI's Russia investigation, which occurred months before my appointment, or matters related to the so-called Steele dossier. These matters are the subject of ongoing review by the Department. Any questions on these topics should, therefore, be directed to the FBI or the Justice Department.

Third, as I explained this morning, it is important for me to adhere to what we wrote in our report. The report contains our findings and analysis and the reasons for the decisions we made. We stated the results of our investigation with precision. I do not intend to summarize or describe the results of our work in a different way in the course of my testimony today.

As I stated in May, I also will not comment on the actions of the Attorney General or of Congress. I was appointed as a prosecutor, and I intend to adhere to that role and to the Department's standards that govern.

Finally, as I said this morning, over the course of my career, I have seen a number of challenges to our democracy. The Russian Government's efforts to interfere in our election is among the most serious, and I am sure the committee agrees.

Now, before we go to questions, I want to add one correction to my testimony this morning. I want to go back to one thing that was said this morning by Mr. Lieu, who said, and I quote: You didn't charge the President because of the OLC opinion.

That is not the correct way to say it. As we say in the report, and as I said at the opening, we did not reach a determination as to whether the President committed a crime.

And, with that, Mr. Chairman, I'm ready to answer questions.

[The statement of Mr. Mueller follows:]

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President's credibility?

Mr. Mueller. And that I can't get into.

Mrs. Demings. Director Mueller, I know based on your decades of experience you've probably had an opportunity to analyze the credibility of countless witnesses, but you weren't able to do so with this witness?

Mr. Mueller. Well, with every witness, particularly a leading witness, one assesses the credibility day by day, witness by witness, document by document. And that's what happened in this case. So we started with very little, and, by the end, we ended up with a fair amount. My -- yeah, a fair amount.

Mrs. Demings. Thank you. Well, let's go through some of the answers to take a closer look at his credibility, because it seems to me, Director Mueller, that his answers were not credible at all.

Did some of President Trump's incomplete answers relate to Trump Tower Moscow?

Mr. Mueller. Yes.

Mrs. Demings. For example, did you ask the President whether he had at any time directed or suggested that discussions about Trump Moscow project should cease?

Mr. Mueller. Should what?

Mrs. Demings. Cease.

Mr. Mueller. Do you have a citation?

Mrs. Demings. Yes. We're still in Appendix C, section 1-7.

Mr. Mueller. The first page?

Mrs. Demings. Uh-huh. It says: "The President 'did not answer whether he had at any time directed or suggested that discussions about the Trump Moscow project should cease...but he has since made public comments about that topic.'"



Mr. Mueller. Okay. And the question was?

Mrs. Demings. Did the President -- let me go on to the next. Did the President fully answer that question in his written statement to you about the Trump Moscow project ceasing? Again, in Appendix C.

Mr. Mueller. And can you direct me to the particular paragraph you're adverting to?

Mrs. Demings. It would be Appendix C, C-1. But let me move forward.

Nine days after he submitted his written answers, didn't the President say publicly that he, quote, "decided not to do the project," unquote? And that is in your report.

Mr. Mueller. I'd ask you, if you would, to point out the particular paragraph that you're focused on.

Mrs. Demings. Okay. We can move on.

Did the President answer your followup questions? According to the report, there were followup questions because of the President's incomplete answers about the Moscow project. Did the President answer your followup questions, either in writing or orally?

And we're now in --

Mr. Mueller. No.

Mrs. Demings. -- Volume II, page 150 through 151.

Mr. Mueller. No.

Mrs. Demings. He did not.

In fact, there were many questions that you asked the President that he simply didn't answer. Isn't that correct?

Mr. Mueller. True.

Mrs. Demings. And there were many answers that contradicted other evidence

you had gathered during the investigation. Isn't that correct --

Mr. Mueller. Yes.

Mrs. Demings. -- Director Mueller?

Director Mueller, for example, the President, in his written answers, stated he did not recall having advance knowledge of WikiLeaks releases. Is that correct?

Mr. Mueller. I think that's what he said.

Mrs. Demings. But didn't your investigation uncover evidence that the President did, in fact, have advance knowledge of WikiLeaks public releases of emails damaging to his opponent?

Mr. Mueller. And I can't get into that area.

Mrs. Demings. Did your investigation determine after very careful vetting of Rick Gates and Michael Cohen that you found them to be credible?

Mr. Mueller. That we found the President to be credible?

Mrs. Demings. That you found Gates and Cohen to be credible in their statements about WikiLeaks?

Mr. Mueller. Those areas I'm not going to discuss.

Mrs. Demings. Okay.

Could you say, Director Mueller, that the President was credible?

Mr. Mueller. I can't answer that question.

Mrs. Demings. Director Mueller, isn't it fair to say that the President's written answers were not only inadequate and incomplete, because he didn't answer many of your questions, but where he did, his answers showed that he wasn't always being truthful?

Mr. Mueller. There I would say generally.

Mrs. Demings. Generally.

Director Mueller, it's one thing for the President to lie to the American people about your investigation, falsely claiming that you found no collusion or no obstruction. But it's something else altogether for him to get away with not answering your questions and lying about them. And as a former law enforcement officer of almost 30 years, I find that a disgrace to our criminal justice system.

Thank you so --

Mr. Mueller. Thank you, ma'am.

Mrs. Demings. -- much.

I yield back to the chairman.

The Chairman. Mr. Krishnamoorthi.

Mr. Krishnamoorthi. Director Mueller, thank you for your devoted service to your country.

Earlier today, you described your report as detailing a criminal investigation, correct?

Mr. Mueller. Yes.

Mr. Krishnamoorthi. Director, since it was outside the purview of your investigation, your report did not reach counterintelligence conclusions regarding the subject matter of your report.

Mr. Mueller. That's true.

Mr. Krishnamoorthi. For instance, since it was outside your purview, your report did not reach counterintelligence conclusions regarding any Trump administration officials who might potentially be vulnerable to compromise or blackmail by Russia, correct?

Mr. Mueller. Those decisions probably were made in a counter -- in the FBI.

Mr. Krishnamoorthi. But not in your report, correct?

# **EXHIBIT X**

**U.S. House of Representatives**  
**Committee on the Judiciary**

Washington, DC 20515-6216

One Hundred Sixteenth Congress

**MEMORANDUM**

**To:** Members of the Committee on the Judiciary  
**From:** Chairman Jerrold Nadler  
**Date:** July 26, 2019  
**Re:** Procedures for Handling Grand Jury Information

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As the Members of the Committee are aware, on June 11, 2019, the House approved H. Res. 430, a resolution authorizing the Chair of the Judiciary Committee to initiate certain judicial proceedings, including filing a petition pursuant to Federal Rule of Criminal Procedure 6(e) to obtain grand jury information redacted by the Attorney General from the Mueller Report, and other grand jury information connected to the Special Counsel's investigation.

I expect that such a petition may be filed in the upcoming days. As a result, I believe it is important to issue procedures governing access by Committee and non-Committee Members to grand jury information at such time as our petition is approved by the court. I am attaching a copy of those procedures.

House Judiciary Committee Procedures for Handling Grand Jury Information

1. The Chairman, the Ranking Member, and staff so designated, shall, at all times, have access to and be responsible for all information received by the Committee subject to Federal Rule of Criminal Procedure 6(e) (hereinafter “grand jury information”). The Chairman shall designate five (5) staff for the majority and, in consultation with the Ranking Member, three (3) for the minority under this paragraph. Other Committee Members and staff shall have access in accordance with the procedures hereafter set forth.

2. Grand jury information shall be maintained in a secure area designated by the Chairman for that purpose. Except as otherwise authorized below, copying, duplicating, or removal of grand jury information is prohibited. Notes may be taken on grand jury information by anyone authorized hereunder to review said information; but any notes shall be stored in the same secure area designated for storage of grand jury information.

3. The Chairman, after discussion with the Ranking Member and the Department of Justice, shall initially recommend to the Committee any grand jury information to be presented to Committee. Such grand jury information shall be presented in executive session pursuant to the rules of the House and the Committee.

4. Prior to the commencement of any Committee presentation at which grand jury information will be heard or considered, each Committee Member will be furnished with a confidential list of the grand jury information. No Member or staff shall make the list or any part thereof public, unless authorized by a majority vote of the Committee, a quorum being present.

5. Prior to any vote making public any disposition with respect to any grand jury information presented to it, the Committee Members shall have a reasonable opportunity to examine the relevant grand jury material. No Member or staff shall make any such grand jury information public unless authorized by a majority vote of the Committee, a quorum being present.

6. With respect to Paragraphs 3-5, Committee staff may review the grand jury information as necessary to assist the Committee. Personal staff shall not have access to the grand jury information.

7. Any examination of grand jury information, other than in a Committee presentation, shall be made in a secure area designated by the Chairman. Copying, duplicating, or removal of grand jury information is prohibited.

8. Only grand jury information approved hereunder to be included in the record will be publicly reported to the House; all other grand jury information will be considered as executive session material.

9. Any Member or authorized staff may discuss grand jury information only with others so authorized to see such information; provided, however, that reasonable precautions shall be taken to have that discussion in a confidential setting.

10. Before being granted access to grand jury information, Members and authorized staff must be briefed on the handling of grand jury materials, and on these procedures.

11. The Chairman, the Ranking Member, and staff so designated, of the House Permanent Select Committee on Intelligence ("Intelligence Committee") shall, at all times, also have access to the grand jury information received by the Judiciary Committee. The Intelligence Committee Chairman shall designate five (5) staff for the majority and, in consultation with the Intelligence Committee Ranking Member, three (3) for the minority under this paragraph. Access to the grand jury materials by the Intelligence Committee Chairman, Ranking Member, and designated staff shall be subject to the same terms and conditions set forth above governing access for the Judiciary Committee Chairman, Ranking Member, and designated staff. Other Intelligence Committee Members and staff shall have access to the grand jury information in accordance with the procedures set forth above for other Judiciary Committee Members and staff.

12. The Chairman, after consultation with the Ranking Member, may issue additional procedures governing access by other Non-Committee Members, consistent with House Rule XI, clause 2(e)(2).

# **EXHIBIT Y**



March 8, 1974

The Honorable John J. Sirica  
Chief Judge  
U. S. District Court for the  
District of Columbia  
U. S. Courthouse  
Washington, D. C. 20001

Dear Judge Sirica:

At its meeting on Thursday the Committee on the Judiciary of the House of Representatives agreed unanimously to authorize and direct me respectfully to request that you provide the Committee the materials delivered to you last Friday by the Grand Jury.

On February 6, 1974, the House, by a vote of 410 to 4, authorized and directed the Committee on the Judiciary "to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America." A copy of that resolution, (H. Res. 803), is enclosed.

In the floor debate that preceded the vote on that resolution I explained that the purpose of the resolution was to empower the Committee to exercise in any and every case the full, original, and unqualified investigative power conferred upon the House by the Constitution. (Congressional Record - House, February 6, 1974, Page H 528.)

Last Friday the Grand Jury presented to you, as Chief Judge for the District Court, District of Columbia, two documents and a brief case. Prior to acting on its resolution, the Judiciary Committee had been informed, on the basis of public reports and disclosures in open court on the previous day that this material included a two-page grand jury report. These have all been placed under seal by the Court. On Wednesday it was stated in open court by Mr. Lacovara, Counsel to the Special Prosecutor, that the Grand Jury had requested that the material be transmitted to the House of Representatives, as necessary to its carrying out its impeachment inquiry. (Daily Transcript, Pages 78, 79, 84 and 85.)

During the same hearing the Special Prosecutor, by Mr. Lacovara, advised the Court, in light of the President's directive to turn over to the House Judiciary Committee all materials which he turned over to the Special Prosecutor, that these materials are not necessarily coterminal with the content of what the Grand Jury has asked this Court to transmit to the House Judiciary Committee. (Daily Transcript, Page 79.)

The unanimous resolution of the Judiciary Committee reflects the Committee's view that in constitutional terms it would be unthinkable if this material were kept from the House of Representatives in the course of the discharge of its most awesome constitutional responsibility.

Our Constitution intended that matters of such overwhelming national significance as the current ongoing impeachment inquiry should be decided on the basis of the best available evidence and the fullest possible understanding of the facts. Were the House to act in this impeachment inquiry without having had the opportunity to take this grand jury material into account, I fear that each House member, and, in fact, the entire country, would experience an enormous lack of confidence in our constitutional system of government.

Pending presentation of the results of the impeachment inquiry, all material received by the inquiry staff will be held strictly in accordance with confidentiality procedures adopted by the Judiciary Committee on February 22, 1974. A copy of those procedures is enclosed. The Committee, in adopting those procedures, has determined that they afford the strictest limitation that can be imposed responsibly on materials received by the inquiry staff, consistent with proper discharge of the Committee's constitutional duty.

The Committee has been proceeding and will continue expeditiously with its impeachment inquiry in a manner that takes fully into account the interests of individuals and the orderly conduct of other governmental processes. Central to the Committee's procedure, however, and to our system of government, is the essential, dominant responsibility and power reposed by the Constitution in the House alone.

Mr. Doar and Mr. Jenner have reported to the Committee your question of Wednesday whether it might be feasible to defer the impeachment inquiry until after the September 9 trial date you have set for the pending indictments. The Committee has asked me to report to you that it is in no respect possible for the Committee and the House of Representatives now to suspend for any period of time their present

The Honorable John J. Sirica

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March 8, 1974

pursuit of their constitutional responsibility. The House and the Judiciary Committee are under a controlling constitutional obligation and commitment to act expeditiously in carrying out their solemn constitutional duty.

Sincerely,

PETER W. RODINO, JR.  
Chairman

Enclosures

/bf

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

IN RE:

APPLICATION OF THE COMMITTEE ON  
THE JUDICIARY, U.S. HOUSE OF  
REPRESENTATIVES, FOR AN ORDER  
AUTHORIZING THE RELEASE OF  
CERTAIN GRAND JURY MATERIALS

Misc. No. 19-\_\_\_\_\_

**[PROPOSED] ORDER**

Upon consideration of the Application of the Committee on the Judiciary, U.S. House of Representatives, pursuant to Local Criminal Rule 57.6, it is HEREBY:

ORDERED that the Application is GRANTED and that the following grand jury materials be released to the Committee:

1. All portions of the *Report on the Investigation Into Russian Interference In The 2016 Presidential Election* (the Mueller Report) that were redacted pursuant to Federal Rule of Criminal Procedure 6(e);
2. Any underlying transcripts or exhibits referenced in the portions of the Mueller Report that were redacted pursuant to Rule 6(e); and
3. Transcripts of any underlying grand jury testimony and any grand jury exhibits that relate directly to:
  - a. President Trump's knowledge of efforts by Russia to interfere in the 2016 U.S. Presidential election;
  - b. President Trump's knowledge of any direct or indirect links or contacts between individuals associated with his Presidential campaign and Russia, including

with respect to Russia's election interference efforts;

- c. President Trump's knowledge of any potential criminal acts by him or any members of his administration, his campaign, his personal associates, or anyone associated with his administration or campaign; or
- d. Actions taken by former White House Counsel Donald F. McGahn during the campaign, the transition, or McGahn's period of service as White House Counsel.

SO ORDERED on this \_\_ day of \_\_, 20\_\_.